146 US 325

RECORD, CASE NO. 14963.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. ~~1489~~. 1007

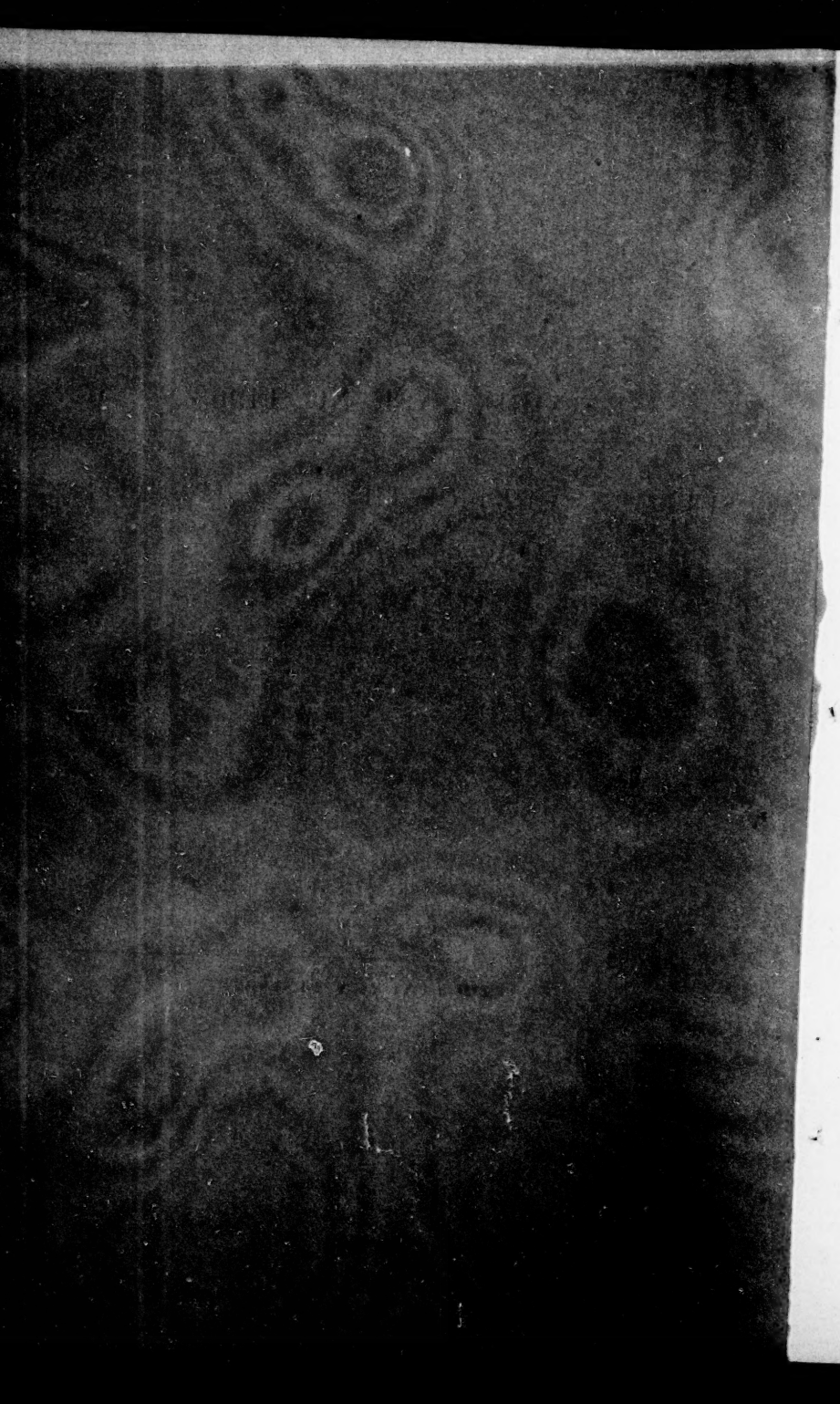
C. A. BENSON (IMPLEADED WITH MARY RAUTZAHN),
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JANUARY 14, 1892.



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1 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the district court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 13th day of October, 1890, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY, *October* 17*th*, 1890.

UNITED STATES *vs.* C. A. BENSON AND MARY RAUTZAHN.	2834. Murder.

Ordered by the court that the above case be, and it is hereby, certified to the circuit court.

In testimony whereof I hereunto set my hand and affix the seal of said court at my office in Topeka, in said district, this 29th day of October, A. D. 1890.

[SEAL.] J. C. WILSON, *Clerk.*

(Endorsed): No. 6620. The United States vs. C. A. Benson and Mary Rautzahn. Copy of order certifying case to circuit court. Filed Oct. 29, 1890. Geo. F. Sharitt, clerk.

2 THE UNITED STATES OF AMERICA,
District of Kansas, First Division, ss:

In the district court of the said United States in and for the first division of the said district, October term, 1890.

THE UNITED STATES OF AMERICA *vs.* C. A. BENZON AND MARY RAUTZAHN (whose more full Christian names are unknown).	Indictment for murder on Fort Leavenworth military reservation.

At the term of the district court of the United States of America in and for the said first division of said district of Kansas, begun and held at Leavenworth in the first division of said district, on the 13th day of October, in the year of our Lord one thousand eight hundred and
3 ninety, the grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire of offences committed within the first division of the said district of Kansas, upon their oaths do find and present that C. A. Benson and Mary Rautzahn, whose more full Christian names are to the grand jurors aforesaid unknown, late of the district of Kansas and of the first division of said district of Kansas, on or about the 23d day of March, in the year of our Lord one thousand eight hundred and ninety, at the Fort Leavenworth military reservation, in the district of Kansas aforesaid, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force and arms in and upon the body of one

Teresa Mettman, then and there being, feloniously, wilfully, and of their deliberately premeditated malice aforethought did make an assault, and that the said C. A. Benson and Mary Rautzahn, with a certain revolving pistol, a more particular description of which is to the grand jurors aforesaid unknown, then and there charged with gunpowder and leaden bullets, which said revolving pistol they, the said C. A. Benson and Mary Rautzahn, in their hands then and there had and held, then and there feloniously, wilfully, and of their deliberately premeditated malice aforethought did discharge and shoot off to, against, and upon the said Teresa Mettman, and that the said C. A. Benson and Mary Rautzahn, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said C. A. Benson and Mary Rautzahn discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their deliberately premeditated malice aforethought did strike, penetrate, and wound her, the said Teresa Mettman, in and upon the left side of the head of the said Teresa Mettman, about two inches posterior to the left ear of her, the said Teresa Mettman, giving to her, the said Teresa Mettman, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the revolving pistol aforesaid by the said C. A. Benson and Mary Rautzahn, in and upon the left side of the head
4 of her, the said Teresa Mettman, one mortal wound of the depth of four inches and of the width of half an inch, of which said mortal wound she, the said Teresa Mettman, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said C. A. Benson and Mary Rautzahn, her, the said Teresa Mettman, in the manner and by the means aforesaid, feloniously, wilfully, and of their deliberately premeditated malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

5 Second count: The grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire of offences committed within the first division of the said district of Kansas, upon their oaths do find and present that C. A. Benson and Mary Rautzahn, whose more full Christian names are to the grand jurors aforesaid unknown, late of the district of Kansas, and of the first division of said district of Kansas, on or about the 23d day of March, in the year of our Lord one thousand eight hundred and ninety, at the Fort Leavenworth military reservation, in the district of Kansas aforesaid, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force and arms in and upon the body of one Teresa Mettman, then and there being, feloniously, wilfully, and of their deliberately premeditated malice aforethought, did make an assault, and that the said C. A. Benson and Mary Rautzahn, with a certain revolving pistol, a more particular description of which is to the grand jurors aforesaid unknown, then and there charged with gunpowder and leaden bullets, which said revolving pistol they, the said C. A. Benson and Mary Rautzahn, in their hands then and there had and held, then and there feloniously, wilfully, and of their deliberately premeditated malice aforethought, did discharge and shoot off to, against, and upon the

said Teresa Mettman, and that the said C. A. Benson and Mary Rautzahn, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said C. A. Benson and Mary Rautzahn discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their deliberately premeditated malice aforethought did strike, penetrate, and wound her, the said Teresa Mettman, in and upon the left side of the neck of the said Teresa Mettman, about two inches posterior to the left ear of her, the said Teresa Mettman, giving to her, the said Teresa Mettman, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the revolving pistol aforesaid by the said C. A. Benson and Mary Rautzahn, in and upon the left side of the neck of her, the said Teresa Mettman, one mortal wound of
6 the depth of four inches and of the width of half an inch, of which said mortal wound she, the said Teresa Mettman, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said C. A. Benson and Mary Rautzahn, her, the said Teresa Mettman, in the manner and by the means aforesaid, feloniously wilfully, and of their deliberately premeditated malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

7 The grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire of offences committed within the first division of the said district of Kansas, upon their oaths do find and present that C. A. Benson and Mary Rautzahn, whose more full Christian names are to the grand jurors aforesaid unknown, late of the district of Kansas and of the first division of said district of Kansas, on or about the 23d day of March, in the year of our Lord one thousand eight hundred and ninety, at the Fort Leavenworth military reservation, in the district of Kansas aforesaid, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force and arms in and upon the body of one Teresa Mettman, then and there being, feloniously, wilfully, and of their deliberately premeditated malice aforethought did make an assault, and that the said C. A. Benson and Mary Rautzahn, with a certain dangerous weapon, to wit, a sand bag, club, or other blunt instrument, a more particular description of which is to the grand jurors aforesaid unknown, which they, the said C. A. Benson and Mary Rautzahn, in their hands then and there had and held, then and there feloniously, wilfully, and of their deliberately premeditated malice aforethought did strike and beat her, the said Teresa Mettman, in and upon the back part of the head of her, the said Teresa Mettman, thereby breaking, fracturing, and crushing the skull of her, the said Teresa Mettman, and giving to her, the said Teresa Mettman, then and there with the instrument aforesaid and by means of striking and beating aforesaid by them, the said C. A. Benson and Mary Rautzahn, in and upon the back of the head of her, the said Teresa Mettman, one
8 mortal contusion, bruise, fracture, and wound, of which said mortal wound she, the said Teresa Mettman, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said C. A. Benson and Mary Rautzahn, her, the said Teresa Mettman, in the manner and by the means aforesaid, feloniously, wilfully,

and of their deliberately premeditated malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JOSEPH W. ADY,
United States Attorney.

No. 6620. (No. 2834.) The United States vs. C. A. Benson and Mary Rautzahn. Murder. A true bill, J. W. Farnsworth, foreman. Witnesses: Bertha Foster, John Mettman, Mrs. C. A. Benson, Rosa Benson, Jim Barry, Geo. Sutton, Dr. M. S. Thomas, Henry Mettman, Prof. Lighton, Dr. C. C. Goddard, Mrs. Bartell, Max. Groenfeldt, Dr. C. B. Gunn, Henry Schindler, W. M. Pickens, N. G. Singleton, William Fullman, William Uhlrich, Sanford Harris, Jas. Robinson, Dan. McFarland, Hugh Knipe, Jno. Canipp, Dr. Lane, E. C. Murphy, Mrs. Alice A. Foster, Mrs. Krohn, Dr. Jas. A. Lane, J. W. Powell, Jas. Doane, A. W. Brewster, J. H. Atwood, J. Gumbiner, Tracy Mace, S. B. Wickens (Leavenworth, Kas.), Mary Rautzahn, Samuel Dodd, Camden, N. J.; W. D. Fleming, Wm. Hooper, Leavenworth. Filed Oct. 18, 1890. J. C. Wilson, clerk. Filed Nov. 6, 1890. Geo. F. Sharitt, clerk.

9 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *June 1st*, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620. Indictment for murder.

And now, on this first day of June, 1891, the same being the first judicial day of the circuit court of the United States for the district of Kansas, at Leavenworth, in said district of Kansas, comes J. W. Ady, esq., United States district attorney, and for and on behalf of the United States, moves the court for a severance of defendants on the trial of this cause. And it appearing to the court that good reason exists for allowing a separate trial of defendants in this cause, it is, therefore, ordered by the court that said defendants be proceeded against and tried separately for the offense charged in the indictment.

JOHN A. RINER, *Judge.*

10 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA
against
C. A. BENSON, IMPLEADED WITH MARY Rautzahn. } No. 6620. Indictment for murder.

Comes now said C. A. Benson, one of the defendants named in the indictment herein, and demurs to said indictment and says:

First. That the said indictment does not, nor does any or either count thereof, state facts sufficient to constitute a public offense against the laws of the United States.

district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 4, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620.

Now comes as well the United States by J. W. Ady, U. S. attorney, as the said defendant, C. A. Benson, in his own proper person, and by W. C. Webb and William Dill, his attorneys, and said defendant, C. A. Benson, being arraigned on the indictment herein, and to each count thereof pleads not guilty thereto and to each count of said indictment.

14 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 4, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620.

This day the above-entitled cause came on for trial, the United States appearing by its attorney, J. W. Ady, and the defendant in his own proper person, and by his attorneys, W. C. Webb and William Dill. Thereupon, both parties announcing themselves ready for trial, came the following persons, regularly drawn and summoned to serve as petit jurors at this term of this court, to wit: W. D. Kelley, A. W. Simcock, John A. Dailey, William Bruce, John T. Woods, B. T. Miller, J. R. Garrett, E. T. Duvant, A. C. Sprague, Geo. W. Clark, Daniel Ulrich, and S. H. Holmes, and thereupon, for good cause shown to the court, S. H. Holmes, J. R. Garrett, Daniel Ulrich were excused, and thereupon Isaac Hamlin, Charles S. Uhl, and A. A. Newman, regularly drawn as jurors as aforesaid, were called in the jury box, and thereupon Geo. W. Clark was challenged peremptorily by the United States. Whereupon H. L. Jarboe, regularly drawn as aforesaid, was called in the jury box; whereupon John A. Dailey and E. T. Durant were challenged peremptorily by the defendant, C. A. Benson. Thereafter B. F. Fortney and W. W. Wilson, regularly summoned as aforesaid, were called into the jury box. The defendant,
C. A. Benson, having waived the 3 and 4 challenge, the United
15 States challenged peremptorily A. A. Newman. And it appearing to the court that by reason of challenge there is not of the jurors regularly drawn a petit jury to try this cause, the court thereupon ordered the U. S. marshal to complete the panel from the bystanders. The jury thereupon being completed as follows, to wit: W. D. Kelley, A. W. Simcock, W. W. Wilson, William Bruce, John T. Woods, B. T. Miller,

Second. That this court has no jurisdiction of or over the supposed offense set forth or stated in said indictment, or in any or either count thereof.

W. C. WEBB,
Atty. for C. A. Benson.

2d June, 1891. 6620. U. S. circuit court. The United States agst. C. A. Benson, impleaded, etc. Demurrer to indictment. Filed June 3, 1891. Geo. F. Sharitt, clerk.

11 UNITED STATES
vs.
C. A. BENSON.

And now, on the 4th day of June, 1891, it being satisfactorily made to appear to the court by J. W. Ady, United States district attorney for the district of Kansas, that the employment of a stenographer is necessary in the trial of said cause, it is, therefore, by the court here ordered that H. B. Tracy be and is hereby appointed stenographer to take down the entire proceedings in the trial of said cause at the expense of the United States.

JOHN A. RINER, *Judge.*

(Endorsed): 6620. In cir. ct. U. S., dist. of Kansas. U. S. vs. C. A. Benson. Appointment of stenographer. Filed June 4, 1891. Geo. F. Sharitt, clerk.

12 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 4, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620.

Now comes, as well the United States, by J. W. Ady, U. S. attorney, as the defendant, C. A. Benson, in his own proper person, and by W. C. Webb and William Dill, his attorneys, and thereupon came on for hearing the demurrer of the defendant C. A. Benson to the indictment herein filed against him, and said demurrer being argued by counsel and considered by the court, is by the court overruled. To which ruling and decision the defendant now here excepts.

13 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth in said

Chas. S. Uhl, I. D. Gonson, A. C. Sprague, Isaac Hamlin, James Madill, Z. A. Goodrich, who, having been examined as to their qualifications, were duly empaneled and sworn to well and truly try the matters submitted to them and a true verdict render according to the law and the evidence, the trial of this case is proceeded with. The hour of adjournment having arrived and the jury being admonished as to their duties, are, by order of the court, placed in charge of a sworn bailiff, further consideration of this case is postponed until to-morrow.

16 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY. *June 5th*, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620.

Now come the parties same as on yesterday, and the jury being called, answering to their names, the trial of the case is proceeded with by the introduction of evidence. The hour of adjournment having arrived, the jury being in the charge of a sworn bailiff, further consideration of the case is postponed until to-morrow.

17 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

SATURDAY, *June 6th*, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZHAN. } 6620.

Now come the parties same as on yesterday, and the jury being called, answering to their names, the trial of the case is proceeded with by the introduction of evidence. The hour of adjournment having arrived, the jury being in charge of a sworn bailiff, further consideration of the case is postponed until Monday next.

18 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth in said dis-

trict, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *June 8th*, 1891.

THE UNITED STATES. }
vs. } 6620.
C. A. BENSON AND MARY RAUTZHAN. }

Now come the parties same as on Saturday last, and the jury being called, answering to their names, the trial of the case is proceeded with by the introduction of evidence. The hour of adjournment having arrived, the jury being in charge of a sworn bailiff, further consideration of the case is postponed until to-morrow.

19 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the City of Leavenworth, in said district on Monday, the 1st day of June, 1891, proceedings were had, and appear of record, in words and figures following, to wit:

TUESDAY, *June 9th*, 1891.

THE UNITED STATES }
vs. } 6620.
C. A. BENSON AND MARY RAUTZAHN. }

Now comes the parties same as on yesterday, and the jury being called, answering to their names, the trial of the case is proceeded with, and the jury having heard the evidence, arguments of counsel and instructions of the court, retire in charge of a sworn bailiff to consider of their verdict. The hour of adjournment having arrived and the jury not being agreed to a verdict, further consideration of this case is postponed until to-morrow.

20 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the City of Leavenworth, in said district, on Monday the 1st day of June, 1891, proceedings were had and appear of record, in words and figures following, to wit:

WEDNESDAY, *June 10th*, 1891.

THE UNITED STATES }
vs. } 6620.
C. A. BENSON AND MARY RAUTZAHN. }

Now come the parties same as on yesterday, the defendant being present in person and by counsel, and the jury being called answering to their names, and return into court the following verdict to wit: "In the circuit court of the United States for the district of Kansas, The United States

vs. C. A. Benson and Mary Rautzahn, indictment for murder. We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths find the defendant, C. A. Benson, guilty of murder as charged in the first count of the indictment. And not guilty upon the second and third counts as charged in the indictment. B. T. Miller, foreman."

21 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the City of Leavenworth, in said district, on Monday the 1st day of June, 1891, proceedings were had, and appear of record, in words and figures following, to wit:

SATURDAY, *June 13th*, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZAHN. } 6620.

Now on this day come the parties hereto, the defendant C. A. Benson in person and by his counsel, W. C. Webb and William Dill, the United States being represented by J. W. Ady, United States attorney for the district of Kansas; and thereupon came on for argument the motion heretofore filed by the defendant C. A. Benson to set aside the verdict of the jury heretofore returned and filed in this case and to grant a new trial herein, and was argued by counsel and taken under advisement by the court.

22 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday the 1st day June, 1891, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 18, 1891.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZAHN. } 6620.

Now on this day come the parties hereto, the defendant, C. A. Benson, in person and by his counsel, W. C. Webb and William Dill, the United States being represented by J. W. Ady, United States attorney for the district of Kansas; and the court, having considered the motion of the defendant, C. A. Benson, to set aside the verdict and to grant a new trial herein, heretofore filed and argued by counsel, and being fully advised in the premises, ordered that said motion be and the same is hereby overruled; to which order and ruling of the court the defendant, C. A. Benson, at the time said ruling was made, then and there excepted. And thereupon the defendant, C. A. Benson, by his attorneys, W. C. Webb and William Dill, by leave of court filed his motion in arrest of judgment herein, and the same was argued by counsel; and the court, being fully

advised in the premises, ordered that said motion be and the same is hereby overruled; to which order and ruling of the court the defendant, C. A. Benson, at the time said order and ruling was made, then and there excepted; and thereupon, upon application of the defendant, C. A. Benson, the court ordered that he, the said defendant, have until and including the 17th day of September, A. D. 1891, to present to the court for
23 allowance his bill of exceptions herein. It is further ordered that said bill of exceptions be submitted to J. W. Ady, United States attorney, for his inspection at least ten days before said 17th day of September, A. D. 1891. And thereupon, on this 18th day of June, A. D. 1891, the defendant, C. A. Benson, being present in person and by his counsel, the United States being represented by J. W. Ady, United States attorney for the district of Kansas; J. W. Ady, United States attorney, moved the court for judgment and sentence upon the verdict of the jury heretofore returned and filed in this cause. Thereupon the court asked the defendant, C. A. Benson, if he had anything to say why the judgment and sentence of the court should not be pronounced against him at this time, to which interrogatory propounded by the court the defendant, C. A. Benson, replied that he had nothing to say. It is therefore considered, ordered, and adjudged, and the sentence of the court is that you, C. A. Benson, be confined in the common jail of Leavenworth County, in the State and district of Kansas, until Thursday, the fifth (5th) day of November next, 1891, and that on that day, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon of said day, you be taken from said jail, by the marshal of the United States for the district of Kansas, to some suitable place of execution in said county of Leavenworth, in the State and district of Kansas, and that you then and there be hanged by the neck until you are dead.

24 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
C. A. BENSON, DEFENDANT.

Comes now J. W. Ady, esq., U. S. Att'y for the district of Kansas, and shows to the court that the above-entitled action was on an indictment for the crime of murder involving difficult questions of law and fact in which there was a verdict of guilty, and thereupon moves the court for a special allowance as a counsel fee in the sum of $30.00.

J. W. ADY,
U. S. Attorney.

And now on this 18th day of June, 1891, the foregoing application is duly presented in open court and it is ordered by the court that a counsel fee of $30.00 be allowed as asked for in the above-entitled cause.

JOHN A. RINER, *Judge.*

(Endorsed:) No. 6620. Petition & order. Filed June 18, 1891. Geo. F. Sharitt, clerk.

25 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES
vs.
C. A. BENSON ET AL.

Stipulation.

It is hereby agreed by and between the attorney for the United States and attorney for C. A. Benson that defendant's attorney shall have until the 25th day of October to prepare and present a bill of exceptions in above-entitled case.

W. C. WEBB,
WILLIAM DILL,
Attorneys for C. A. Benson.
J. W. ADY,
Attorney for United States.

(Endorsed:) No. 6620. U. S. vs. C. A. Benson. Stipulation. Filed Sept. 24, 1891. Geo. F. Sharitt, clerk.

26 *Bill of Exceptions.*

In the circuit court of the United States for the district of Kansas, first division.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* C. A. BENSON AND MARY RAUTZAHN, defendants. | Indictment for murder on Fort Leavenworth military reservation, Kansas.

J. W. Ady, United States attorney, and J. H. Atwood, for the plaintiff; W. C. Webb and William Dill, for the defendant, C. A. Benson. Testimony of witnesses in the trial of said cause as to said C. A. Benson at Leavenworth, Kansas, beginning June 4th, 1891, and continuing to and including the 9th day of June, 1891.

The plaintiff, to maintain the issues upon its part, produced the following evidence:

Mrs. JOHANNA BENSON, a witness called on behalf of the plaintiff, being first duly sworn, and being unable to speak the English language, Rosa Benson, a daughter of the witness, was sworn as interpreter. Certain papers were handed to witness, Mrs. Benson.

Question by Mr. ADY to interpreter:

Q. Ask her to examine these papers and say if she knows in whose handwriting they are?

(Objection by W. C. Webb, attorney for defendant. Your honor please, the woman upon the stand is the wife of the defendant. I desire that the court shall be satisfied of that by proper inquiries in order that the fact may be established, and then I wish her to be advised that she can not except with her own free will and voluntary consent be used as a witness against him. She is his lawful wife.)

COURT. Is that conceded?

Mr. ADY. Yes, sir.

COURT. Do you want me to instruct her that she can do as she pleases?

27 WEBB. I am at a loss what answer to make to that question. Under our State law she may, if she chooses, voluntarily be a witness, but she can not be compelled to be a witness. That is the State law, and at the time that law was enacted there was no Federal statute to authorize a party charged with crime to testify in his own behalf. I have not looked it up. I did not expect this question to arise so early in the case. Whatever is in the Federal statute is not in my mind, except that the defendant may testify in his own behalf. But I desire that she be plainly advised, if she is competent at all, that she shall not be required to testify to anything except upon her own free voluntary wish or desire to do so. I think, myself, we ought to have been advised that she was to be put upon the stand first. I went to see her one day, and I found her in tears then, as she is now, and she declined to have any conversation with me. Whatever your honor determines the law to be respecting her competency under any circumstances is for the court to say, but I wish her advised that she need not testify unless she desires to testify.

COURT. We are governed by the State law as to that matter, and I will so instruct her if you desire it.

Mr. ADY. The objection does not lie in the mouth of the defendant, and I do not know of any rule of ethics or military tactics for one party to notify the other how they are going to conduct the case.

COURT. (To interpreter.) You can say to your mother that as she is the wife of the defendant she may answer the questions if she is willing to, but she can not be compelled to answer, but if she is willing to answer in the interest of justice she can do so.

A. Interpreter. She says that what she knows and can answer she will testify to.

Question by Mr. ADY. You may ask her to state in whose hand-

28 writing these lettere are?

A. She says these are the letters he sent to her.

Q. Who sent to her?

A. Benson.

Q. Ask her whose handwriting they are in?

A. They are his handwriting.

Q. The defendant, Benson's?

A. They are Benson's handwriting.

Q. All of them?

A. Yes, sir.

(Letters here given to stenographer, who marked them Exhibits "A" and "B," respectively.)

Q. Get her to look at these slips and tell whose handwriting they are?

A. She says it is all his handwriting.

Q. Ask her if she knows his handwriting well?

A. Yes, sir; she says she knows his handwriting, because he always wrote to her.

(Exhibits 1 to 6 given to stenographer and so marked by him.)

Q. Show her Exhibit "A" and "B" again, these two letters, and ask her where she got them?

A. She says she got them from the mail-carrier, and an envelope was around them when he delivered the letters.

Q. From the mail-carrier that delivers mail at her house? Ask her that.

A. She says when she came home from work they were in her mail box?

Q. Where she usually receives mail? Ask her that.

A. Yes, sir.

Q. Tell her to look over these letters and say whether they are the same as when she got them?

A. Mamma says it is correct; everything in them.

Q. How is that?

A. She says everything in the letters is just as it was when she got them.

No cross-examination.

JOHN METTMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

29

Q. Mr. Mettman, speak up loud enough so that the gentlemen over here can hear. Your name is John Mettman?

A. Yes, sir.

Q. You reside in Leavenworth?

A. Yes, sir.

Q. How long have you resided here?

A. Thirty-four years.

Q. During that time, or any portion of it, have you worked at the fort?

A. I worked the last eighteen years at the fort.

Q. In what capacity?

A. At the military prison at Fort Leavenworth.

Q. What do you work at?

A. I drive a team—six-mule team.

Q. During all that time?

A. For the last fifteen years.

Q. How many days in the month?

A. Thirty days.

Q. Work every day?

A. Yes, sir; every day.

Q. Sundays as well as the rest?

A. Yes, sir; Sundays, as well as the rest.

Q. What were your wages for the month?

A. Thirty dollars in gold, or what they call rations.

Q. What did you do with your rations?

A. Gave it to the old lady every pay-day.

Q. When did you last see Mrs. Mettman?

A. I last saw Mrs. Mettman on the 23d day of March.

Q. What day in the week was that?

A. Sunday evening.

Q. Were you at the fort that day?

A. I was at the fort that day.

Q. What time in the evening did you return?

A. About five o'clock, as near as I can make it.

Q. You returned from where?
A. From the fort to my home.
Q. Where is that home?
A. On Dacota street—925 Dacota street.
Q. In this city?
A. Yes, sir.
Q. That was March, 1890 or 1891; this year or last year?
A. It was 1890.
Q. You returned about what time in the evening?
A. Near five o'clock.
Q. Who was at home with your family when you got there?
A. The whole family.
Q. Who was your family?
A. The two children, Mrs. Rautzahn, Mrs. Mettman, and Henry Mettman.
Q. Who was Mrs. Rautzahn?
A. Daughter of Mr. John Mettman.
Q. Daughter of yourself?
A. Yes, sir.
Q. What is her age?
A. I don't recollect; I think she is about twenty-seven years of age, or something near that.
Q. Is she married?
A. She was married.
Q. How long ago?
A. Married about eight years ago.
Q. To whom?
A. To a man by the name of Rautzahn.
Q. What was his business?
A. He was a Government man; he was a soldier during that time.
Q. What became of him?
A. He got discharged; his time was up, and then they moved away from here.
Q. And then what became of him?
A. As much as I could hear he got killed by lightning; that was the last I heard of him.
Q. In what State?
A. In Illinois.
Q. You were not there?
A. No, sir.
Q. Since that time where has his wife lived?
A. She wrote home about the accident, and we found out she didn't have anything to live on or support her, and we wrote on to her if she felt like coming home she could do so.
Q. And since that time where did she live?
A. With me ever since.
Q. Has she children?
A. Yes, sir.
Q. By whom?
A. By Mr. Rautzahn.
Q. What are their ages?

A. The boy is eight, and the girl past five.
Q. Where do they live now?
A. The children; they are staying with me.
Q. You are taking care of them?
A. Yes, sir.
Q. Who occupies the house there?
A. I do myself.
Q. And take care of the children?
A. Yes, sir.
Q. And where is Mary?
A. Mrs. Rautzahn is confined in the county jail at Leavenworth.
Q. And has been for how long?
A. Since over a year.
Q. And you have taken care of the children at home?
A. Yes, sir.
Q. About what age is Henry?
A. Henry is past thirty.
Q. What is he doing?
A. Working on the Rock Island; a fireman.
Q. How long has he been working there?
A. Last five or six years.
Q. Mr. Mettman, what, if anything, do you know about Henry having any money in the house on the 23d day of March, 1890?
A. Don't know.
Q. Did you have any knowledge what he did with his wages that he earned?
A. I didn't.
Q. Do you know how much he got a month?
A. He was not home half the time; he was off; don't know what his wages were.
Q. Now, during this time you say you were working at the fort, what portion of the time were you at home and what time were you away?
A. I left at six o'clock regularly in the morning, and got back at six in the evening.
Q. You say regularly at six. Did you vary from that?
A. I didn't lose a day in fifteen years.
Q. What were your hours of retiring during that time—going to bed and getting up? At what hour did you go to bed and arise in the morning?
A. I went to bed twenty minutes after eight regularly, and got up at ten minutes to five in the morning.
Q. You say that the last time you saw Mrs. Mettman was the evening of March 23d, I believe?
A. Yes, sir.
Q. How old was Mrs. Mettman?
A. Mrs. Mettman was near fifty.
Q. How long had you and her lived together as husband and wife?
A. Thirty-four years; a little better. I got married in 1857.
Q. How long had you lived with her in Leavenworth?
A. Thirty-four years.
Q. You married here?

A. Yes, sir; married in Missouri, in Platt County.
Q. What state of health was she in when you last saw her?
A. Was in good health.
Q. Now, you may state, Mr. Mettman, what conversation, if any talk, occurred between you and Mrs. Mettman the last time you saw her.
Judge WEBB. Objection as not being competent at all.
COURT. On what grounds would that be admissible?
Mr. ADY. I have stated the case, and that the evidence is entirely circumstantial, and I wish to show that she left home merely in a casual manner and the remarks which she made to him when she left the house that evening; whether she left in good spirits and good health. I do not know what is going to be contended for. The gentleman here this morning made intimations that perhaps she might have committed suicide.
COURT. If you wish to show that there was any ill feeling, you may show that.
Mr. ADY. Is it not competent, your honor, when a person departs and afterwards their whereabouts is attempted to be discovered in connection with criminal evidence, as to where they were, etc., to prove what they said, the observations they made when leaving home? It is a familiar rule of Greenleaf.
COURT. I am entirely familiar with the rule, but I do not think the case has advanced to a point where it is proper to rely upon that rule.
Q. What time in the evening was it that you last saw her.
A. As near as I can give, half-past five o'clock or twenty minutes to six.
Q. Just whereabouts was it at your place there that she left you?
A. Half way between the stable and the house.
Q. What were you doing at the time?
A. I was putting up a swing for the two little children; fixing a swing for them.
31 Q. How was your wife dressed at the time?
A. She had middling good clothes; I think she had a dark black suit on.
Q. How did you part? On terms of friendship or otherwise?
A. She was very friendly when she left and so was I. I was full of fun with the children.
Q. Had you any trouble?
A. None at all.
Q. About what hour did you say it was?
A. Half-past five o'clock.
Q. Did you ever see her again alive?
A. After that; no, sir.
Q. Did you notice which way she went?
A. I seen her going out of the gate and she went out east.
Q. Was that in the direction of the city or otherwise?
A. She went towards the city.
Q. You say you never saw her again alive?
A. No, sir.
Q. Did you see her afterwards dead?
A. Yes, sir; I seen her on the day she was buried.
Q. Where?
A. At the house.

Q. At whose house?
A. At our own premises.
Q. At that time you were under arrest?
A. Yes, sir.
Q. You say you saw her there?
A. Yes, sir.
Q. Was it the corpse of your wife?
A. It was my wife.
Q. What was her name?
A. Theresa Mettman.
Q. When she went away you may state whether she had a package with her of any kind; a satchel or any such thing?
A. I don't think she did; I could not prove it.
Q. Did you notice anything unusual about her manner or the circumstances of her going away?
A. No, sir; I did not; didn't notice.

Cross-examination:

Questions by W. C. WEBB:

Q. Mr. Mettman, what is your age?
A. Past sixty.
Q. How long did you say you lived in Leavenworth?
A. Thirty-four years.
Q. What did you say Mrs. Mettman's age was? How old was Mrs. Mettman?
Q. Mrs. Mettman, she was nearly fifty.
Q. Was she in good health?
A. Yes, sir.
Q. How tall was she? How high?
A. Near something about four feet four inches.
Q. How much would she weigh when you saw her last alive?
A. About 155 or 160.
Q. You said that that Sunday night when you were fixing a swing for the children, and she went away, that you were pleasant and good-natured, and so was she.
A. Yes, sir.
Q. Had you and she always lived together pleasantly and good natured?
A. Yes, sir.
Q. Is it not a fact that you had been divorced from her once?
A. No, sir; not for the last eight years.
Q. You say you were married to her thirty-four years ago and then you disagreed and got a divorce from her, did you not?
A. I did not get a divorce from her.
Q. Shee got a divorce from you?
A. She was trying to eight years ago.
Q. And you married again?
A. She took it back; we was not married again.
Q. Did you not live apart for a time?
A. Yes, sir; for three months.

Q. Is it not a fact that she got a divorce and you afterwards lived together?

A. Well, she compromised the matter.

Q. Is it not a fact, Mr. Mettman, during that time before the divorce proceedings commenced that you drank a good deal of intoxicating liquor?

COURT. I would like to know the purpose of these questions. It is not cross-examination. What is the purpose of this line of inquiry?

Judge WEBB. The object, your honor, is to discredit his testimony by showing such a state of conduct on his part that the jury can fairly take with allowance such testimony that he may give.

32 COURT. This woman was his wife, and she went away, and I doubt whether it is necessary to follow up the whole life of a man; I do not think it is proper cross-examination.

WEBB. I know what the counsel asked him.

COURT. Suppose a man did take a drink of intoxicating liquor a year ago, I do not see that it makes any difference. Confine your examination within a reasonable time. There is no cause to rake up a man's life twenty years ago. The question for the jury is whether or not at this time, or sometime near this time, their relations were pleasant. I think that is all the information the jury can desire. It is all that can affect the case.

Q. On what street does your house front?

A. On Dacota street.

Q. Between what streets?

A. Between Ninth and Tenth.

Q. In what direction does the house front, north or south?

A. The house fronts south. No, it fronts north. The house is on the south side and fronts north.

Q. On the south side of Dacota street and fronts north?

A. Yes, sir.

Q. You say you saw Mrs. Mettman go out of the gate—that is the north gate near the house?

A. Yes, sir; she went out onto Dacota street, and that was about five o'clock, Sunday, March 23d; it was about twenty minutes to six when she left.

Q. Did you ever see her alive after that?

A. No, sir.

Q. When did you next see her or any part of her?

A. Sir?

Q. When did you next see Mrs. Mettman after that Sunday night?

A. I seen her on the funeral day.

Q. Where were you that Sunday night after your wife went out of the north gate?

A. I was at home at the house.

Q. Did you go outside of your lot—outside of your premises that night?

A. I did not.

Q. What time did you go to bed, if at all?

A. About half past eight o'clock.

Q. Who was there at your house when you went away?

A. Mrs. Rautzahn.

Q. Who else?
A. And the children.
Q. Anyone else?
A. No, sir.
Q. Did you get up during that night at all, before morning?
A. I got up; well, I went to bed at half past eight o'clock or twenty minutes past, and I went to bed and fell to sleep, sound asleep, and woke up, and don't know whether ten minutes or twenty minutes, but I woke up and Mrs. Rautzahn was at the room at the time.
Q. At what room?
A. At my sleeping room.
Q. Was she alone there beside you?
A. That was all I seen.
Q. How long did she stay there?
A. I got up and I say to Mrs. Rautzahn, I said: "Why don't you be going to bed? it is time," and I went back to bed again to sleep, and that is all I know.
Q. What time did you get up in the morning?
A. Ten minutes to five.
Q. Mr. Mettman, you say on the day of the funeral that you had been arrested?
A. Yes, sir.
Q. You had been arrested on account of your wife's death?
A. I was arrested; yes, sir.
Q. What were you charged with?
A. I don't know.
Q. Were you not charged with having killed your wife?
A. I don't know.
Q. Were you not put in jail?
A. I was put in jail.
Q. How long were you kept there?
A. About three weeks, or near it.
Q. You said you got up next morning before five o'clock?
A. About the usual time; ten minutes to five.
Q. Did you get breakfast at home?
A. I do.
Q. Did you that morning?
A. Yes, sir.
Q. Was your wife there at breakfast?
A. I didn't see anybody.
Q. Was your daughter, Mrs. Rautzahn, there?
A. Yes, sir.
Q. Were the children there?
A. Yes, sir.
33 Q. Was Henry there?
A. Henry was on the railroad.
Q. Did you ask anything about where your wife was?
A. I asked Mrs. Rautzahn: "Mother is not come home yet?" She said, No.
Q. Then you went to work?
A. Yes, sir.

Q. When did you come back?
A. Six o'clock.
Q. That was in the evening, Monday; was Mrs. Rautzahn at home then?
A. Yes, sir.
Q. Was Mrs. Mettman there?
A. I didn't see her.
Q. Did you ask about her?
A. I asked: "Mother didn't come home yet?" I said it is something strange, she has not made her appearance all this time.
Q. Who did you ask?
A. Mrs. Rautzahn; she said she didn't see or hear of her.
Q. Was Henry there?
A. Henry was gone to work.
Q. Were those children, the children eight and five years old, there?
A. Yes, sir.
Q. Did they ask about their grandmother?
A. I didn't ask the children at all.
Q. I don't think you understood me. Did the children ask about their grandmother?
A. I think I didn't pay a great deal of attention to the children, because I felt kinder a little uneasy.
Q. What did you do about your wife not being there?
A. Yes, sir.
Q. I say, what did you do?
A. I went off.
Q. Where did you go?
A. I went up the street to an old lady; she always went there; visited her once in awhile; always went once in awhile.
Q. What was her name?
A. Mrs. Hephemm.
Q. Where does she live?
A. Lived on Dacota, between Sixth and Seventh.
Q. That was east of your house?
A. Yes, sir.
Q. Three blocks?
A. Four blocks.
Q. Did you find out there where your wife was?
A. Mrs. Mettman was there Sunday evening of that day, about six o'clock, and she left there, but which way she went don't know.
Q. Then where did you go?
A. I went down town.
Q. Where did you go down town?
A. I inquired at the railroad office.
Q. What railroad office?
A. Missouri Pacific.
Q. Who did you inquire of?
A. There was an agent there; don't know his name.
Q. Did you get any information about Mrs. Mettman?
A. I asked him: "Did you see anybody going off on the cars; a middle-aged woman, that bought a ticket for some place; I think for New York;" I asked him; I think that was it.

Q. What did he say?

A. He says, "No, he was not at the office at the time."

Q. Why did you want to know whether he had seen anybody buy a ticket to go to New York?

A. Because I had an idea she had gone off; she was talking about going to New York.

Q. You said she didn't take any satchel?

A. I could not say.

Q. You said she came out to where you were fixing a swing and you saw her go out of the gate?

A. I didn't see her have a satchel; could not say.

Q. Where did you go from the railroad office?

A. The clerk says he was not on duty at that time; that there was somebody else, but he didn't think a New York ticket was bought.

Q. I did not ask you about that. Where did you go from the railroad office?

COURT. After you left the railroad office where did you go?

A. I stopped—I came back and stopped at Mr. Knipp's place.

Q. Where is that?

A. On Seventh and Miami.

Q. Did you find anything about Mrs. Mettman there?

A. I made inquiry whether they had seen Mrs. Mettman.

34 Q. Where did you go then?

A. They said no.

Q. Where did you go then?

A. I went right home; I left there.

Q. Did you go to bed then?

A. I left there.

COURT. The question is, did you go to bed?

A. Yes, sir; I went home to bed.

Q. Did you get up that Tuesday night before morning?

A. I didn't.

Q. What time did you get up Tuesday morning?

A. Ten minutes to five.

Q. Was your wife at home?

A. No, sir.

Q. You went away to work, did you?

A. No, sir.

Q. What did you do then?

A. I staid at home.

Q. All day Tuesday?

A. I staid at home; I didn't stay home all day Tuesday; I came down town at half past eight o'clock.

Q. Where did you go?

A. I came down town, to Mr. Knipp's.

Q. What is his name?

A. Mr. Knipp.

Q. What did you go down there for?

A. Well, I passed there and asked him if he had seen anything of the old lady, and he said no.

Q. Then where did you go?

A. I went down to the pontoon bridge on the Missouri River.
Q. What did you go down there for?
A. To inquire whether she had gone into Missouri and gone home.
Q. Did you find whether she had been there or not?
A. The man that was there at the time said he was not on duty that day; said his partner was there and he said if you come around in about an hour, he says, he will be here and he can tell you all about it.
Q. Did you go down in about an hour?
A. I staid there a little while and he was not a coming and I came on to the Missouri Pacific depot and I staid there and waited for Henry Mettman to come in on the train.
Q. Well, go on. Henry Mettman was your son? What did you do? Did you talk to him?
A. Well, I was down there and I thought I might as well wait for him, to see if he had news.
Q. Did your son come in on the train?
A. Yes, sir.
Q. Did he know anything about your wife?
A. No, sir.
Q. What did you do?
A. Came home.
Q. What then?
A. To the house.
Q. After you got home what did you do?
A. We had dinner.
Q. After dinner what did you do?
A. Mrs. Rautzahn was there and getting dinner.
Q. What did you do after dinner?
A. I didn't do anything; staid home all afternoon.
Q. Well, then, did you stay at home Tuesday night?
A. I went that Tuesday evening and went over across the street and asked my neighbor if they had seen Mrs. Mettman; that she had not made her appearance yet.
Q. What neighbor?
A. To Mr. Kryser, across the street, and he said he didn't hear anything; and I came back and went to bed.
Q. What did you do next morning?
A. I went to the fort to work.
Q. Work there all day?
A. Yes, sir.
Q. Came back at night?
A. At six o'clock; yes, sir.
Q. What did you do that night? What did you do then?
A. I went up the street.
Q. Where; what place?
A. Up to Mrs. Hepham's.
Q. The same place you went Monday night?
A. Yes, sir. I said that Mrs. Mettman has not made her appearance; that there was something not right; said she didn't see anything of her.
Q. What did you do then?
A. Went home to bed.

Q. What did you do Thursday morning?
A. Thursday morning, got up and went to work.
Q. Work all day Thursday?
A. Yes, sir; came back Thursday night, and Thursday night I went up the street and went by Mrs. Hepham's, and inquired of Mrs.
35 M———, an Irish woman, living on that street.
Q. Is that the same place you went to before?
A. The first place, yes, sir——
Q. Who did you see there?
COURT. Let him finish the answer; he is trying to think of the name.
A. I left the house and went to Mrs. Hepham's and asked her—Mrs. Maloney—she lives on the corner of Sixth and Dacota streets, and asked her where she lived; Mrs. Hepham told me and I went over there and asked Mrs. Maloney, she was at home, and she says she didn't see anything of Mrs. Mettman for the last eight days; I think she said over a week.
Q. Then what did you do?
A. From there—she says no, she had not seen her—I left and went down—it was a cold day—I went down to the Times Office and put an advertisement in about Mrs. Mettman.
Q. That was Thursday night?
A. Yes, sir.
Q. Then Mrs. Mettman had been away from Sunday night to Thursday night, and then on Thursday night after making this inquiry you went and had an advertisement put in the Times?
A. I left the office and came on up the street and stopped at Mr. Knipp's on Sixth and Miami.
Q. Then what did you do?
A. They didn't hear or see her over there, and I left and went home and went to bed.
Q. That was Thursday night?
A. Yes, sir.
Q. What did you do then?
A. Friday I got up and went to work.
Q. Did you see the advertisement in the Times that morning?
A. Well, I was at work on the Government reservation.
COURT. The question is, Did you see the advertisement in the Times?
A. I seen it in the evening; I noticed it was advertised.
Q. Did you work all day Friday?
A. I worked up until twelve o'clock.
Q. About what time Friday?
A. Up until twelve o'clock.
Q. Then what did you do?
A. I got a dispatch to come home immediately.
Q. Who sent you the dispatch?
A. I got the dispatch from the military prison.
Q. Did you go home?
A. I did.
Q. Then what occurred?

A. After I got home I seen there was four police coming right against me walking up the street at east of the house on Dacota street, and I got home and by the time I arrived there I was in charge of the police.

Q. Well, what time was the funeral?

A. Funeral was on Sunday.

Q. Were you in charge of the police all the time from Friday to Sunday?

A. I was locked up.

Q. You have said that you saw your wife's body the day of the funeral; that was was Sunday; why didn't you see it before that?

A. I could not; I was in jail.

Q. In the city jail?

A. In the lockup.

Q. Did you have that notice of your wife's disappearance published in any other paper except the Times?

A. Not at all.

Q. You have told a good many places you did go; now, I will ask you if you went to the chief of police headquarters, or to anybody connected with the police department, and ask any information?

A. At the time I was down at the Missouri Pacific passenger train and waited for Henry Mettman, Marshal Murphy passed along through, and after the train started out I called Mr. Murphy back and I said, "Mr. Marshal, I have got something important for you." Says I, "Mrs. Mettman disappeared Sunday evening and she is not seen or heard of." Says I, "You had better be on the lookout and report it."

Q. What time of the week was that?

A. That was Tuesday.

Q. What time in the day?

A. The train was two hours, or an hour and twenty minutes late; it was a little after ten o'clock; after the Union Pacific got in.

Re-direct examination.

Questions by Mr. ADY:

Q. Mr. Mettman, if Mrs. Mettman was killed by somebody, do
36 you know by whom she was killed?

A. I don't.

Q. Do you know anything about her killing?

A. Not at all.

Mr. ADY. Your honor, there are one or two questions that the state of the testimony now would not be held competent, but Judge Dundy held that when I put a witness on the stand that I must ask him everything or he would not allow me to recall him.

COURT. It depends whether it is necessary to recall him. It depends something upon your judgment.

Mr. ADY. That was my notion, but the judge had a peculiar notion.

COURT. These investigations, while they should not be long, everything that is competent should be allowed. I want the jury to have all the information that they can.

Mr. ADY. I do not want to ask a question that would seem to be incompetent now.

Q. Mr. Mettman, you may state whether you applied to all places at which you expected you could get information about your wife when she was missing.

Judge WEBB. Objection as incompetent, etc.

No ruling, as Mr. Ady changed question.

Q. Why didn't you go somewhere else to find out where your wife was?

A. I could not go any other place; I thought where she had visited she would go there; she was occasionally around there, and I went to those places.

Mr. WEBB. May I make request that this witness shall not be allowed to divulge to any other witness, and that the officer in charge of the witnesses shall not let him have access to them.

COURT. Mr. Mettman can stay in the court room; he is not subject to the rule; he has testified; there is no objection after the witness has testified.

BERTHA FOSTER, a witness, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Are you the person who wrote a letter for Mrs. Mettman?
A. Yes, sir.
Q. State your name.
A. Bertha Foster.
Q. I did not hear your full name.
A. Bertha Foster.
Q. You are a married lady?
A. No, sir.
Q. Miss Bertha Foster, then. Where do you reside, Miss Foster?
A. On Pawnee street.
Q. In this city?
A. Yes, sir.
Q. Were you acquainted with Mrs. Theresa Mettman in her lifetime?
A. Yes, sir.
Q. Did you reside there on the 23d day of March, 1890?
A. Yes, sir.
Q. Same place?
A. Yes, sir.
Q. Did you see her on the evening of March 23, 1890?
A. Yes, sir.
Q. Where at?
A. At our house.
Q. Do you know what the occasion of her presence at your house was?
A. No, sir.
Q. Do you know what she came for?
A. No, sir.
Q. What was her errand for, anything?
A. She asked me to write a letter and I wrote it.
Q. To whom was the letter written?
A. To Mrs. Skedaire.
Q. Do you know this person to whom the letter was written; what relation there was between her and Mrs. Mettman?

A. After I got home I seen there was four police coming right against me walking up the street at east of the house on Dacota street, and I got home and by the time I arrived there I was in charge of the police.

Q. Well, what time was the funeral?

A. Funeral was on Sunday.

Q. Were you in charge of the police all the time from Friday to Sunday?

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A. Yes, sir.
Q. State your name.
A. Bertha Foster.
Q. I did not hear your full name.
A. Bertha Foster.
Q. You are a married lady?
A. No, sir.
Q. Miss Bertha Foster, then. Where do you reside, Miss Foster?
A. On Pawnee street.
Q. In this city?
A. Yes, sir.
Q. Were you acquainted with Mrs. Theresa Mettman in her lifetime?
A. Yes, sir.
Q. Did you reside there on the 23d day of March, 1890?
A. Yes, sir.
Q. Same place?
A. Yes, sir.
Q. Did you see her on the evening of March 23, 1890?
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Q. Where at?
A. At our house.
Q. Do you know what the occasion of her presence at your house was?
A. No, sir.
Q. Do you know what she came for?
A. No, sir.
Q. What was her errand for, anything?
A. She asked me to write a letter and I wrote it.
Q. To whom was the letter written?
A. To Mrs. Skedaire.
Q. Do you know this person to whom the letter was written; what relation there was between her and Mrs. Mettman?

A. Her daughter.
Q. Where at?
A. New York.
Q. The person addressed was in New York, you say?
A. Yes, sir.
Q. Did you write a letter?
A. Yes, sir.
Q. At whose dictation? Who stated to you what to write?
A. Mrs. Mettman.
Q. What time in the evening did she leave?
A. Eight o'clock.
37 Q. What condition of health did she seem to be in?
A. Good health.
Q. What were her spirits; depressed or cheerful, or how?
A. She seemed cheerful.
Q. About eight o'clock in the evening, you say she left?
A. Yes, sir.
Q. Did you see her when she went away from the house?
A. No, sir; did not go out with her.
Q. Who did?
A. My mother.
Q. At eight o'clock, was it dark?
A. Yes, sir; quite dark; real dark.
Q. Do you remember whether that was a light night or not; whether clear or not?
A. It was kinder gloomy.
Q. Do you remember how Mrs. Mettman was dressed on that occasion?
A. I think it was a black dress.
Q. What color?
A. I don't know.
Q. Did you notice a shawl or wrap?
A. I don't remember.
Q. Did you notice what she wore on her head?
A. A hat.
Q. Did you see those articles that were supposed to have been found in the Missouri River after her body was found?
A. No, sir.
Q. You think it was a black dress?
A. I think so, but don't remember the color; it was kinder dark.
Q. Did you ever see Mrs. Mettman after that?
A. No, sir.
Q. Did she go away from the house alone, so far as you know?
A. Yes, sir.
Q. Was there anything said about anyone going with her?
A. No, sir.
Q. Your mother is alive, is she?
A. Yes, sir.
Q. Do you know whether your mother went out with her that evening?
A. Yes, sir; she went to the gate.
Q. Anyone else?
A. No, sir.

Q. What is your mother's given name?
A. Theckla.
Q. Do you know whether she was subpœnaed as a witness?
A. Yes, sir; once before.
Q. At this term of court?
A. Yes, sir; she is in the other room.
No cross-examination.

Mrs. THECKLA FOSTER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Mr. WEBB. Mr. Ady, is the witness' name on the indictment?

Mr. ADY. This witnesses name is not on the indictment; she is the person we intended to have there instead of the lady who has just testified, who is her daughter; all we desire to prove by her is the direction Mrs. Mettman took when she left there, and that she left alone; do you object?

Mr. WEBB. We do not object.

Q. State you name.
A. Theckla Foster.
Q. Where do you reside, Mrs. Foster?
A. On Pawnee street.
Q. In this city?
A. Yes, sir.
Q. Where did you reside on the 23d day of March, 1890?
A. In the same place.
Q. Did you know Mrs. Mettman in her lifetime?
A. Yes, sir.
Q. Did you see her on that Sunday, the 23d of March?
A. Yes, sir; she came to my house at six and left at eight.
Q. In the evening?
A. Yes, sir.
Q. How was it then as to being dark or otherwise?
A. How?
Q. How was it as to being dark or otherwise when she left?
A. Yes, sir; it was dark; cloudy like.
Q. What direction did she start in from your house?
A. She went west.
Q. Would that be in the direction of her home?
A. Yes, sir.
Q. The ordinary and usual route home?
A. Yes, sir.
Q. Have you traveled it frequently?
A. How?
Q. Have you traveled the route frequently, so as to know it?
A. No, sir.
Q. You knew the way to her house from your house?
A. Yes, sir.
Q. Did she go away alone?
A. Yes, sir.
Q. Do you remember how she was dressed—what color of dress?

A. She had a black dress and gray shawl and black hat.

Q. What direction, if any, did you make about sending an escort with her—some one to go with her?

A. When she left my husband says, "It is early yet." I said,
38 "It is rather lonesome to go that way." She said, "I am not afraid; I will take the middle of the street."

Q. Did she take the middle of the street?

A. No, sir; she was on the sidewalk.

Q. Which side of the street did she go on?

A. North side.

Q. Is your house on the north side?

A. Yes, sir; north side.

Q. She went west on the north side of the street, on the sidewalk?

A. Yes, sir.

COURT. Is your house on the north side of the street, facing south?

A. Yes, sir.

Q. You saw her walk away?

A. Yes, sir.

Q. What were the last words said?

A. Good night. She said "Good night," and I said, "Come over to see soon."

Q. Did you see her again?

A. No, sir.

Q. Did you see the clothing that was supposed to have been taken from the Missouri River at the time you saw her after death?

A. How is that?

Q. Did you see the shawl and dress and clothing supposed to have been taken from the Missouri at the time you saw her after death?

A. She had the same things on.

Q. You mean the corpse you saw had the same things on?

A. That she had on when she left our house.

Q. I understood you to say it was a corpse, was it?

A. Yes, sir.

Q. When was it that you saw the corpse?

A. It was the 28th March, was the day.

Q. Did she seem to be in good health and spirits the evening she was at your house?

A. Yes, sir; real pleasant that evening.

Q. Did she say or do anything that indicated any hurry to get away or anything of that kind?

A. About her family, you mean?

Q. No hurry to get away from your house?

A. No, sir; didn't seem to be in a hurry.

Cross-examination:

Questions by Mr. WEBB:

Q. Your house, you say, is on the north side of Dacota street?

A. Pawnee street.

Q. Between what streets?

A. Between Fifth and Sixth.

Q. How far from Sixth?

A. It is 3 lots from Sixth.
Q. Your house stands back a little from the sidewalk?
A. Not very much.
Q. It stands back from the sidewalk?
A. Yes, sir.
Q. And then when you step from the gate to the sidewalk you go west to Sixth street?
A. Yes, sir.
Q. And you say your house is three lots east of that?
A. Yes, sir.
Q. And you say that when Mrs. Mettman left she went through the gate onto the sidewalk?
A. Yes, sir.
Q. Did she remain on the north or south side?
A. On the north side.
Q. How far did you see her on her way west?
A. About as far as our lot.
Q. You didn't see her get as far as Sixth street?
A. No, sir.
Q. Did anyone go out of the house with you?
A. No, sir.
Q. Who was at home at the time she came there?
A. My husband and my two oldest daughters.
Q. That is the young lady Bertha, who was here?
A. Yes, sir.
Q. You say she came there at what hour?
A. At six.
Q. And staid until eight?
A. Yes, sir.
Q. What was done by her during that time?
A. My daughter wrote a letter.
Q. Anything else?
A. No, sir.
Q. Was your husband there all the time?
A. Yes, sir.
Q. You went with her out of the door to the gate?
A. Yes, sir.
Q. After you left the door and went out what did you say to her or she to you?
A. She says, "Good night; come over to see me."
Q. That is what she said; what did you say?
A. I said, "Yes."
Q. Did any other talk or conversation take place between you after you went out of the front door?
39 A. No, sir.
Q. How far is it from your front gate there to go west to where Mrs. Mettman lived?
A. About six blocks, I guess.
Q. Did she live on Pawnee street or the next street south?
A. She is on the next south.

Q. Then in order to go home from your house she would walk west from your house how far?

A. How?

Q. If she went directly from your house home how far west would she walk from your house even if she turned and went south?

A. About three lots she had to go.

Q. Three lots would bring her to Sixth street.

A. I do not understand.

COURT. His question is, if she went on her way home how far west would she go before she would come to the block south before she got upon the street she lived on. Now, then, she lived south and west, how far west would she go before she turned south?

WEBB. It is of no consequence; she need not state.

Q. Do you know of your own knowledge between what streets the Mettman house was situated?

A. It is between 9th and 10th.

HENRY METTMAN, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is Henry Mettman?
A. Yes, sir.
Q. How old are you?
A. Thirty.
Q. You reside where?
A. Leavenworth.
Q. How long have you resided here?
A. All my life, nearly.
Q. You are a son of John Mettman?
A. Yes, sir.
Q. Who is your mother?
A. Mrs. Theresa Mettman.
Q. When did you last see your mother alive?
A. Sunday evening, March 23d, 1890.
Q. Where?
A. At home.
Q. What time?
A. About ten minutes after four.
Q. About what time?
A. Ten minutes after four.
Q. Was that the last time, as late in the day, as you saw her?
A. Yes, sir.
Q. You separated then?
A. I went to my work.
Q. To your work where?
A. At the Union depot; Rock Island road.
Q. How long have you heen working for the Rock Island road?
A. I don't exactly remember; I think it was along about 1885.
Q. About how many years?
A. About six years.

Q. Where was your run?
A. My run was between here and Lecompton, Missouri.
Q. A freight train was it?
A. No, sir; passenger.
Q. What hours in the day was your run?
A. I left here at five o'clock in the evening and got there at 7:20 in the evening, the same evening; and I left at 8:20 next morning and got here at eleven.
Q. Did you make that run daily?
A. Yes, sir; daily.
Q. You were not at home nights?
A. No, sir; not at all.
Q. What condition of health was your mother in when you left?
A. Good health.
Q. What spirits?
A. Cheerful spirits.
Q. Was your father at home when you left?
A. Yes, sir.
Q. What time did he come home?
A. About four o'clock.
Q. Where had he been during the day?
A. Fort Leavenworth.
Q. What spirits did he seem to be in?
A. Good spirits.
Q. Did you notice any difficulty or trouble between him and your mother?
A. No, sir.
Q. Was there any difficulty or trouble in the family so far as you know at that time?
A. No, sir.
Q. What time the next day did you return?
A. At, I believe it was, about twenty minutes to eleven.
Q. Was your mother at home?
A. No, sir.
Q. Was she ever at home after that?
A. No, sir.
COURT. What time did I understand you to say you returned?
A. Then it was ten o'clock, in the place of eleven now.
Q. You got home about ten o'clock?
A. It was 10:40. It was ten o'clock then, which was changed one hour later.
Q. You say your mother was not at home; had not got home?
A. No, sir.
Q. When you arrived at home what did you hear about her absence?
A. I saw that sister was crying there; seemed to be worried, and I had asked her what was the trouble.
Q. Whom do you refer to as sister?
A. Mrs. Rautzahn?
Q. What did she say?
A. She said mother left Sunday evening and had not got back since.
Q. Prior to this time, Henry, had you been saving any money?

A. Yes, sir.
Q. What did your savings amount to at that time?
A. There was sometimes it was over three months——
Q. I want to know how much your savings amounted to.
A. It was four hundred and forty dollars.
Q. What sort of currency?
A. It was in twenty-dollar gold pieces.
Q. How many?
A. Twenty-two.
Q. How do you know that?
A. I have counted them.
Q. Where was that kept?
A. In the bed.
Q. In what bed?
A. In Mrs. Rautzahn's bed.
Q. Who had custody of the money?
A. Both of them had it; both of them knew of it?
Q. Both who?
A. Mother and Mrs. Rautzahn.
Q. They kept it for you; four hundred and forty dollars, you say?
A. Yes, sir.
Q. How many rooms are there in your house, Henry?
A. Three rooms and summer kitchen; what we used for a kitchen.
Q. This bed in which the money was kept was in what room?
A. In the middle room.
Q. Was there other beds in that room?
A. Yes, sir.
Q. Was that the sleeping room of the whole family?
A. Yes, sir.
Q. All the beds were in that room?
A. No, sir; one was in the front room?
Q. Was that a spare bed?
A. It was a spare bed that we used in case I should be at home.
Q. But the whole family slept in the middle room?
A. Yes, sir.
Q. And the family consisted of who?
A. Father, mother, sister, and two children.
Q. Always been that way?
A. Yes, sir; always that way.
Q. Well, what did you know about this money being gone when you came home that day?
A. I didn't know anything about it, except that she told me that mother was gone and the money too.
Q. Did you make search for the money?
A. I looked, yes, sir; and searched among the bed and looked around, but didn't find it.
Q. Did you know where it was?
A. No, sir.
Q. Did you know the circumstances under which it was taken?
A. No, sir.
Q. Had it been taken with your consent?

A. No, sir.
Q. Did you get that money again?
A. No, sir.
Q. Did you dispose of it in any way?
A. No, sir.
Q. So far as you know, your mother and the money disappeared together?
A. Yes, sir.
Q. When did you see the money last before?
A. I believe it was on the 19th day of March.
Q. How did you happen to see it then?
A. I believe I wanted some money and I went there and got some.
Q. Do you know whether your mother carried the money habitually with her?
A. I could not say.
Q. You entrusted it to them, and, so far as you know, it was kept in the bed?
A. Yes, sir.
Q. Do you know anything about your mother's disappearance?
A. No, sir.
41 Q. If she was murdered, do you know who did it?
A. No, sir.
Q. Do you know anything about where it was done?
A. No, sir.
Q. Did you see her dead body afterwards?
A. Yes, sir.
Q. When and where?
A. Friday, March 28th, at the Missouri River bank.
Q. Where did you first see it?
A. At the Missouri River bank, March 28th.
Q. Where at the Missouri River bank?
A. About forty steps north of Two Mile Creek.
Q. Where Two Mile Creek flows into the river?
A. Yes, sir.
Q. Do you know what lands that is on?
A. It is Government land.
Q. Are you familiar with the reservation?
A. Yes, sir.
Q. Do you know whether the body was lying on the reservation then?
A. Yes, sir; it was.
Q. How near to the Missouri River was it?
A. It was just lifted out about four or five steps onto the bank.
Q. Who was present with the body there at the time?
A. I don't know who was.
Q. You don't know?
A. No, sir.
Q. Was there a number of people there?
A. I didn't take notice who was there.
Q. Was there any clothing on the body, or at or separated from and about the body?

A. Yes, sir; a shawl. It seemed kinder to cover the body.
Q. Do you know whose shawl that was?
A. Yes, sir; my mother's.
Q. Did you see any other clothing there?
A. Yes, sir; saw a hat.
Q. Whose hat?
A. My mother's.
Q. These articles were right there with the body?
A. Yes, sir.
Q. What color was the shawl?
A. It was a gray shawl; it seemed kinder black mixed in.
Q. Did you see any part of her dress?
A. No, sir; not that I recollect.
Q. Did you see the face of the body there?
A. Yes, sir.
Q. Who was it?
A. My mother.
Q. What color was the hat?
A. The hat was a black straw hat.
Q. Do you remember the day of the month it was?
A. The 28th day of March; Friday.
Q. About what hour of the day was it?
A. About my time of coming in on the train.
COURT. That would be in the forenoon?
A. Yes, sir.

Cross-examination:

Questions by Mr. WEBB:

Mr. Mettman, how old a woman was your mother at the time of her death, or when you saw her last?
A. I should judge very near fifty; I don't know her age exactly.
Q. What was her statue or height*h*?
A. Her height*h* was about five feet, I think.
Q. What was her weight at that time?
A. Her weight, I should judge, would be about one hundred and fifty pounds.
Q. Was she in good health, strength, and vigor for a woman of her age?
A. Yes, sir.
Q. How old a man was your father?
A. He was sixty years old the last day of May.
Q. You say you left home about four o'clock in the afternoon, Sunday?
A. About ten minutes after four.
Q. That is what I have it, ten minutes after four, and that you went to your work, and you worked upon the railroad train, and came back the next morning?
A. Yes, sir.
Q. You were not home after that hour—four o'clock and ten minutes—until you returned between ten and eleven, Monday?
A. Yes, sir.

Q. Who did you find at home?
A. Found my sister and the children.
Q. How long did you remain at home?
A. Until evening.
Q. What hour was that?
A. About the same time.
Q. Your father was absent when you came home and absent when you returned, that is, when you went to work.
A. Yes, sir.
Q. You staid at home—you mean the house?
A. Yes, sir.
Q. You didn't go to the fort or go down town?
A. No, sir.
42 Q. Shortly after four o'clock you went to your work again and went where?
A. Cameron, Missouri.
Q. What was your position on the railroad?
A. Fireman.
Q. You made that round trip and returned then on Tuesday?
A. Yes, sir.
Q. What hour did you return, Tuesday?
A. About the same as usual; was not late; right on time.
Q. Between ten and eleven?
A. Yes, sir.
Q. Did you go direct home?
A. Yes, sir.
Q. How long did you remain there?
A. All the time.
Q. Did you go to the fort or go down town?
A. No, sir.
Q. Who was at the house while you were there?
A. On Tuesday?
Q. Yes, sir.
A. Father was there.
Q. Who else, if anyone?
A. Sister.
Q. Who else?
A. The children.
Q. Anyone else?
A. Not that I know of.
Q. You remained there from the time between ten and eleven until about four o'clock, when you again returned to your work, did you?
A. Yes, sir.
Q. And then you made the same kind of a trip to Cameron?
A. Yes, sir.
Q. Same kind of a trip daily. Came back Wednesday?
A. Yes, sir.
Q. Where did you stay Wednesday between the time of coming in and going to work?
A. At home.
Q. And when you say home, do you mean at the house or in the house?

A. Right at home at the house.
Q. Did you go away again on Wednesday?
A. Yes, sir.
Q And returned again on Thursday?
A. Yes, sir.
Q. Go away again on Thursday and returned Friday?
A. Yes, sir.
Q. Now, during any of the days from Monday, Tuesday, Wednesday, or Thursday, when you came in and got through with your work at the depot and went to the house on any one of those days, did you on any one of those days go down town?
A. No, sir; not to my knowledge; I was not.
Q. On Friday, when you came in, did you go clear into the depot before you saw your mothor's remains?
A. No, sir.
Q. How did it happen that the train stopped there where the body was found?
A. The Rock Island trackmaster makes transfers down there, and he was up there, and we had to stop, and he told Brown Hale, the engineer, that he guessed they had found my mother; he didn't tell me, but the engineer came and told me and he said, "I will slow up so that you can get off," and I got off there.
Q. How many persons were there about there?
A. A number of them there.
Q. You say when you saw a body there, and that the body was not in the water, but some steps from the water?
A. Yes, sir; on the bank.
Q. And how many steps from Two-Mile Creek?
A. About forty, as near as I can judge.
Q. You saw the body?
A. Yes, sir.
Q. And such clothing as it had?
A. Yes, sir.
Q. That was Friday, the 28th?
A. Yes, sir.
Q. You had known all the time from Monday morning at eleven o'clock that your mother had been away?
A. Yes, sir.
Q. You have stated that you had saved some money, and that that money was in twenty-dollar gold pieces, and that it was in the charge of your sister and mother; that your sister had charge of it, and that your mother had knowledge of its existence, and that it was kept in a bed in your father's house; you didn't say your father's house, but that is what you meant, didn't you?
A. Yes, sir.
Q. You said that you had seen that last the 19th of March?
A. Yes, sir.
Q. When you went to get some money out of the package, or whatever it was?
A. Yes, sir.

Q. Who else knew of its existence so far as you know, except your sister, Mrs. Rautzahn, and your mother and yourself?

A. I didn't understand that.

Q. I asked you if anybody else beside yourself, your mother and sister, knew that you had that money there?

A. No, sir.

Q. Your father did not know it?

A. No, sir.

Q. Counsel asked you whether your mother carried the money with her. What was your answer?

A. I did not know.

Q. Do you know what the weight of twenty-two gold pieces would be?

A. No, sir.

Q. Did you ever weigh gold at all for the purpose of determining?

43 A. No, sir.

Q. Did you ever carry any sack or package containing twenty-two twenty-dollar gold pieces, or thereabouts?

A. No, sir; yes, sir; I have felt the heft of it, but otherwise I never carried it.

Q. Did you ever lift a sack containing twenty-two gold pieces? About what was its weight? Your best judgment, how many pounds?

A. I could not judge. I would not know the weight.

Redirect examination:

Questions by Mr. ADY.

Q. How often did you see your father at home while you were at work on the railroad?

A. It would be twice a month; sometimes once.

Q. How did that happen?

Mr. WEBB. I do not see that that is material and we object to it.

COURT. You may answer the question. Objection overruled.

A. Once or twice a month.

Q. How did it happen that you did not meet oftener at home?

A. You see he would be at work; would leave at six, and I would get in at eleven and would leave four or five minutes after four and he would get home at six.

Q. You were both regular in your work?

A. Yes, sir.

Q. Did you ever lose any days?

A. Hardly; very few days.

Q. Did you ever know him to lose any?

A. No, sir.

Q. You say he was at home Tuesday?

A. Yes, sir.

Q. There was something remarkable about that, was there not?

A. Yes, sir.

Q. It was something unusual?

A. Yes, sir; something unusual.

Q. Where did you meet him first?

A. He came down to the train. I met him at the train, to see me.

Q. What about?
A. To see whether I had any idea where she went to.
Q. Did you make any search for your mother?
A. Yes, sir; he had made searches.
Q. So far as you know did he look everywhere you expected to find any one?
A. Yes, sir.
Q. Did you know where to look?
A. No, sir.
Q. Did they so far as you know?
A. No, sir; so far as I know of.

Recross-examination:

Questions by Mr. WEBB.
Q. How do you know your father looked for your mother?
A. He told me he did.
Q. That is all the way you know, is it?
A. I have been at home when he first went off to see.
Q. You don't know where he went, do you, only as he told you?
A. That is all.
Q. You say he met you at the train?
A. Yes, sir.
Q. And then he went home with you?
A. Yes, sir.
Q. What did he ask you about your mother?
A. He asked me if I knew where she could have went.
Q. And you told him you did not?
A. Yes, sir.
Q. And then you went home together?
A. Yes, sir.

Redirect examination:

Questions by Mr. ADY.
Q. Did you send telegrams?
A. Yes, sir.
Q. Where to?
A. To New York.
Q. How did that happen?
A. I thought probably she had gone there.
Q. To who?
A. To a sister of mine.

Recross-examination:

Questions by Mr. WEBB.
Q. When did you send that telegram?
A. It was on Wednesday.
Q. What time?
A. Wednesday night; it was after I got to the other end of the route.
Q. That don't tell me what time?
A. It was after I arrived; 7:20 in the evening.

44 WILLIAM FULMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is William Fulman?
A. Yes, sir.
Q. Where do you live?
A. On North Third street, corner of Third and Dacota.
Q. In what town?
A. Leavenworth.
Q. How long have you lived here?
A. For the last sixteen or eighteen years.
Q. What is your occupation?
A. Mining.
Q. Did you know Mrs. Theresa Mettman in her lifetime?
A. No, sir.
Q. Where were you about the 28th day of March, 1890?
A. Where was I? Well, I never keep track of time.
Q. Do you remember finding a dead body in the Missouri River?
A. Yes, sir.
Q. Where were you?
A. I was going hunting.
Q. Who was with you?
A. William Ulrich. I was taking a boat up the river; the north wind was blowing and we could not pull it very well.
Q. You were taking a boat up the river?
A. Yes, sir.
Q. Where was that?
A. North of Leavenworth at the junction of Twomile Creek.
Q. Where the Twomile Creek flows into the river?
A. Yes, sir.
Q. Where was it?
A. On the south side of Twomile Creek we found a body.
Q. What time in the day was it?
A. About nine or ten o'clock.
Q. Who did you say was with you?
A. William Ulrich.
Q. What did you first say that drew your attention?
A. Ulrich first saw a hand sticking up out of the water that way [indicating], and there was a rock lying up over the top of the hand, and I said we will pull up to the creek and then go and telephone to the police.
Q. Where was the hand sticking up?
A. South; right near the bank.
Q. In what river?
A. Missouri River.
Q. How far from Twomile Creek?
A. About two hundred yards down towards town.
Q. Which side of the Missouri?
A. Kansas edge.
Q. Do you know whose lands those are?
A. Government lands.

Q. Part of the military reservation?
A. Yes, sir.
Q. How far was the hand from the edge?
A. When I went up, it was right on the edge of the water; I most stepped on the hand; right on the edge of the water.
Q. Do remember whether the river was falling then or immediately prior thereto?
A. It was falling. It had fell at that time about two feet.
Q. In what space of time had it fell?
A. In one night.
Q. What night?
A. That night.
Q. Immediately previous. The night before you found the body, it had fallen about two feet?
A. Yes, sir.
Q. Did you disturb that body before you telephoned the police?
A. No, sir.
Q. Did anyone come in response to the message?
A. Yes, sir.
Q. Who came?
A. There was Officer Robinson came up, and Sutton, and then the hoodlum wagon came up with some more people; don't know who they were.
Q. Did you there discover anything else; any other portions of a human body?
A. Yes, sir; discovered clothes on the north side of Twomile Creek.
Q. The clothes?
A. Yes, sir.
Q. Where were they?
A. About twenty yards above the creek.
Q. In the water?
A. No, sir; not in the water. The river had fell and left a mud bank and they were on the mud bank.
Q. Rocks about them?
A. Rocks were tied up in the clothes.
Q. What else was discovered?
A. Discovered a leg; I discoved a leg tied up in the sack.
Q. Where was the leg?
A. About forty rods further up the rirver.
Q. That is north of Twomile Creek?
A. Yes, sir.
Q. Further up?
A. Yes, sir.
Q. Further up than the clothing?
Answer. Yes, sir.
Q. What part of this leg did you first see? Was it in the water?
A. The leg was cramped bad, and covered with water. I saw it was a sack, and I didn't know what to make of it; didn't know whether to take it or not.
Q. Could you see any portion of the limb?
A. No, sir.

Q. It was in the sack?
A. Yes, sir.
Q. Was any part of it protruding out of the sack?
A. I never seen any part protruding out. The shoe was out, sunk in the sand, but I could not see it.
Q. Were you there when the people came down and these packages were drawn from the river?
A. Yes, sir.
Q. Did you see these drawn from the river?
Q. Yes, sir.
Q. Who were they drawn out by?
A. I helped to draw them out myself.
Q. Who else?
A. Ulrich and James Berry and Officer Robinson.
Q. Anybody else?
A. That is all.
Q. Which did you draw out first?
A. Drew the body of the woman out first.
Q. When you drew that out, what did you find?
A. Found it was cut in half; cut out there [indicating]. She was cut apart.
Q. What did you get?
A. The trunk of a woman, head and arms and breast.
Q. The body had been cut in two where, did you say?
A. Right under the breast bone.
Q. Was there any weight attached to this body?
A. Yes, sir.
Q. What was it?
A. Sand and rocks were attached.
Q. How were they attached?
A. In a shawl, and the shawl tied around the woman's body.
Q. Tied around how? How was it attached, around the neck?
A. Tied around the neck.
Q. With what?
A. With the shawl.
Q. With the shawl; but how was the shawl to contain weights if it was around the neck? Were the weights tied up in the shawl and then around the neck with rope or string?
A. I don't remember whether there were ropes or not; I think that ropes were tied on the shawl, too.
Q. Were there plenty of rocks there; on the south side of Twomile Creek?
A. Plenty of rocks; yes, sir.
Q. Of the same character as were weighted to the body?
A. Yes, sir.
Q. About where the body was drawn in, was there a bridge?
A. There was a bridge above where the body was drawn in.
Q. A bridge cross Twomile Creek?
A. Yes, sir.
Q. What package did you draw out next?
A. Drawed out the clothes and put them on the bank.

Q. Describe that package.

A. It was some underclothes, and there was some rocks tied up and blood on the inside of the clothes in the centre of the package.

Q. Was there anything else in there but the underclothes?

A. Nothing else; there was a handkerchief.

Q. Did you find a hat? Do you remember a hat; a black straw hat?

A. Yes, sir; I believe there was a black straw hat tied inside.

Q. And you say rocks were in that?

A. Yes, sir.

Q. What was the package tied by?

A. Tied with rope.

Q. Was there any other clothing around it, or anything; sack, or anything?

A. Just tied with rope.

Q. Were the rocks attached to it?

A. Yes, sir; tied up inside the clothes.

Q. That, you say, was right at the margin of the stream; right above Twomile Creek, but right at the margin of the river.

A. Yes, sir.

Q. Did you help to draw out the next package?

A. Yes, sir.

Q. What was that?

A. That was the leg.

Q. What was it in?

A. Gunny sack; the sack drawed over the leg and tied and the mouth of the sack tied around the shoe.

46 Q. With twine or what?

A. Thin rope.

Q. Any stones attached; in that package?

A. No, sir; no stones attached to it.

Q. When this trunk of the body was drawn from the river was the face white yet or discolored?

A. The face was white, and it was blue on one side kinder, from being in the water.

Q. But otherwise it was white?

A. Yes, sir.

Q. Did you notice anything about the teeth?

A. No, sir.

Q. About this limb. Did you see that taken out from the sack it was in?

A. Yes, sir.

Q. Describe to the jury how it had been dismembered from the body?

A. As near as I could come to it the body was cut into here (indicating) under the breastbone, and then one leg cut off and the other part of it put in the sack.

Q. One leg cut off where; cut off how?

A. Cut square off.

Q. That (indicating) or in this (indicating) direction?

A. Could not tell you just exactly; didn't pay attention.

Q. There was one leg missing?

A. Yes, sir.

Q. Do you know which leg this was?
A. No, sir; I do not.
Q. Was this leg—did it appear to be cut from the lower part of the body or the lower part of the body attached to it?
A. No; it was cut from the lower part of the body.
Q. Did you find the other limb and the remains of the body there at that time? Did you find the other leg?
A. No, sir.
Q. Did you find the entrails from the body in any of the packages?
A. It was in the sack with the leg.
Q. The entrails?
A. Yes, sir.
Q. Do you know whether the other leg was found?
A. I heard that the other leg was found by the Union depot.
Q. Never mind what you heard. I just ask what you know?
A. I heard it.
Q. These packages were all found where the river flows, at the margin of the river, which is upon the Government reservation, if I understand it?
A. Yes, sir.

Cross-examination:

Questions by Mr. WEBB:

Q. You say, Mr. Fullman, that the first—and I use the same words that you and counsel used—that the first package, I think it was, that you found, contained the upper part of the body and the head and arms of a woman?
A. It was the first package.
Q. Well, what was it then? The first package contained the head and body and arms of the woman? That is what I asked you, and that is what you found first?
A. Yes, sir.
Q. How far south of Twomile Creek?
A. About two hundred yards.
Q. What do you say was in that package besides those parts of the body?
A. There was a rock.
Q. How many rocks?
A. Two rocks in it.
Q. What size?
A. One two feet square and the other a smaller one.
Q. You call it a packing. Now, what kind of an article, or sack, if it was one, contained this head and trunk?
A. There was no sack to it; it was a shawl.
Q. That was a shawl?
A. Yes, sir.
Q. How large was the shawl?
A. It was a good-sized shawl.
Q. Was the shawl spread out so you could see it?
A. Yes, sir; it was spread out.
Q. How large was it then?
About four feet square.

Q. What was its color?
A. It was a grey shawl.
Q. Of what material was it?
A. I could not tell.
Q. Was it a thick one or a thin one?
A. It was neither.
Q. It was not a thick one then? Was it an old or new one?
A. It was an old one; it looked old at that time.
Q. Was it such a shawl as is worn by women or men?
A. Such a shawl as is worn by women.
47 Q. Was it cut any or torn?
A. No, sir; it was not cut or torn as I could see.
Q And inside of that shawl when you discovered it was the upper part of the trunk or body, the head and the arms and the stones?
A. No, sir.
Q. Then what was it?
A. The shawl was tied around the neck and upper part of the body.
Q. Then it was as I described it, except the head being inside; the head was outside?
A. The head was outside.
Q. You were asked how that was tied around the neck. With the ends of the shawl or tied with rope?
A. Tied with the ends of the shawl.
Q. Then there were no ropes or strings tied around it?
A. Could not say whether it was a rope or string, but I think there was a rope.
Q. The next think was a package of clothes drawn from the water?
A. Yes, sir.
Q. What was the outer covering of that package of clothes, if there was one? What enclosed it?
A. It was some linen cover; could not say whether drawers or not.
Q. Was it a sack?
A. No, sir.
Q. What was inside of that in the way of clothing?
A. There was a handkerchief and a pair of drawers; it made a good bundle. Could not say.
Q. What kind of a handkerchief?
A. A linen handkerchief.
Q. Old one or a new one?
A. It was—it had no tears; it looked kinder new.
Q. Any tears on it?
A. No, sir.
Q. Any blood strains on it?
A. It has been so long that I don't remember whether there were blood stains or not.
Q. What kind of drawers were they? Such as are worn by women or men?
A. Such as worn by women.
Q. Well, your answer to counsel was underclothes; what kind of underclothes besides drawers; were there any?
A. I don't know whether there were or not.

Q. Just name the articles, if you can? If you have named drawers, that is one. You say there was a handkerchief? Was a hat inside the package?

A. Could not say.

Q. What other articles was there?

A. I think these three articles were tied up into a sheet.

Q. And there were stones in that?

A. Yes, sir.

Q. And you say that *that* the sheet, if that was true, covered them. How was it tied up?

A. With rope.

Q. What kind of a rope?

A. Small one.

Q. How long was the rope?

A. About—there was two or three pieces of it; three feet each piece.

Q. Old or new?

A. It was old rope.

Q. Now, the third package. That, you say, contained a leg?

A. Yes, sir.

Q. Which had been severed from the lower part of the body?

A. No, sir; the lower part of the body was there.

Q. Then, I misunderstood you. And that was, you say, in a sack? What kink of a sack?

A. Looked like a bran sack, or white one.

Q. Is that what you called it before?

A. I called it a gunny sack before.

Q. What do you mean by a gunny sack?

A. A gunny sack, isn't that a bran sack?

Q. I am not answering questions. I want you to describe that sack?

A. I call a gunny sack a bran sack; both are the same.

Q. Describe the sack; the size and material?

A. What kind of material?

Q. Of what was it made?

COURT. Describe the sack; that is what I want.

48 A. It was of brown material; I could not say what kind of material.

Q. How large was the sack?

A. About three feet deep and a foot wide, or more.

Q. Was it old or new?

A. It was not old and it was not a new one.

Q. How?

A. It was not old or new.

Q. Let me ask you if that was not such a sack as is used around the fort in which Government grain is kept?

A. I could not say; I never saw any sacks the Government put grain in.

Q. Tell me whether you called it a Government sack.

A. I mean a Government sack; I didn't mean Government sack. I called it a bran sack and a gunny sack, and a bran sack is a gunny sack.

Q. Did you notice that sack so as to be able to know whether it had been used very much or nearly new?

A. No, sir; I didn't notice it.

(Here counsel for defendant moved to strike out the testimony of Mrs. Benson, on the ground that it was incompetent, which motion was overruled, to which ruling the defendant by counsel at the time then and there excepted.)

JAMES BERRY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is James Berry?
A. Yes, sir; Barry.
Q. Where do you reside?
A. 813 North 5th street.
Q. In this city?
A. Yes, sir.
Q. How long have you resided here?
A. Six years.
Q. What is your occupation?
A. Laborer.
Q. Did you know Mrs. Mettman in her lifetime?
A. Yes, sir; slightly acquainted with her.
Q. Were you present at the Missouri River, at about the point of the confluence of Two-Mile Creek with the Missouri River, where the remains of a human body was found on the 28th day of March, a year ago?
A. Yes, sir.
Q. In whose company did you go?
A. Well, there was a lot of the boys went there at the time and the police wagon was coming over the hill.
Q. Were you there when the fragments of the body was drawn from the river?
A. Yes, sir.
Q. What was the first portion of the body you saw?
A. Head and breast.
Q. Describe how it was in the river as you saw it?
A. The hand, left hand stuck up out of the water; right hand, I should say.
Q. Which way was it facing?
A. Right up.
Q. The head of the body was lying out in the water with the face up?
A. Yes, sir.
Q. Could you see the face in the water?
A. No, sir.
Q. Which hand did you say was up?
A. I think it was the right hand.
Q. Was that all that was protruding out of the water?
A. Yes, sir?
Q. Did you see the fragments drawn from the water?
A. Yes, sir.
Q. Who were there?
A. There was Powell; I don't know; Marshal Murphy, I think, and Powell; they were all there at the time.

Q. When the body was drawn up, what portion of the body did you see?

A. Saw the entrails were taken out; it was sawed in two; there was a white shirt, black dress, and a rope or string tied around the neck and a rock tied to it and a black plaid shawl with rocks tied around it.

Q. The entrails were out of the body?

A. Yes, sir; out of this part (indicating).

Q. What was the appearance as to how that body had been severed or cut in two?

A. It was sawed or hacked; it was torn.

Q. Was there any part of the dress on the body?

As. Yes, sir.

Q. What kind?

A. Looked like a black silk.

Q. Did you see part of the under clothing hanging to the body?

A. Yes, sir.

Q. What color was the face? Was it white?

A. The face looked to me like it could not have been in the water over twenty-four hours; there was a red spot over the eye.

Q. Was the face natural or distorted?

A. It looked natural.

Q. Did you recognize the face?

A. No, sir; I knew her when I saw her alive.

Q. You didn't recognize the face when it came out?

A. No, sir.

49 Q. At what point was that that these pieces of the body were drawn from the river.

A. I think about one hundred yards this side of the M. P. bridge.

Q. Which side of Two-Mile Creek?

A. About two hundred yards this side.

Q. How near was the body to the bank of the river?

A. Right at the edge of the river.

Q. How far off?

A. Right off in the water; it seems it must have been put in when the river raised.

Q. Did you see any other fragments of the body drawn from the river?

A. Yes, sir.

Q. Where?

A. It is about 100 to 150 yards above Two-Mile Creek.

Q. What was it?

A. A gunny sack or bran sack; a Government bran sack.

Q. Describe to the jury what kind of a sack it was.

A. A sack they put bran in more than anything else.

Q. A common sack you get at a grain house?

A. Yes, sir.

Q. Any particular mark on it; anything that distinguished it from an ordinray sack which you get at a grain house?

A. Could not say; this was an ordinary potato sack.

Q. You have seen those ordinary sacks that come from the grain house?

A. It was a heavy bag; potato sack; a heavy bag.

Q. You get them at any grain house?

A. I don't know.

WEBB. Well, don't you testify.

Q. What was in that sack, did you say?

A. Well, they made the remark to pull it out, and some of the men said there was nothing in it, and the sand was running over even with the sack, and me and Fulmer and some one else went in and somebody told me to pull it out, and Fulmer had rubber boots and he helped me, and as we pulled it up there was the foot sticking out; the mouth of the sack was tied around the knee.

Q. How was the foot clothed?

A. Yes, sir; the foot had a shoe and stocking, and part of underclothes or pants.

Q. Did you open the sack?

A. Yes, sir; took a knife and cut it open.

Q. What did you find in the sack?

A. The remains of a woman; entrails and from this part (indicating) down, and two or three big heavy rocks.

Q. What was the appearance of the body as to where the leg had been taken off?

A. The leg was cut off here (indicating) square across; it was muddy and dirty and I didn't examine it at all.

Q. You say the entrails were in that sack?

A. Yes, sir.

Q. Anything else?

A. Two big rocks.

Q. What was the size of the rocks?

A. About that big (indicating).

Q. What kind?

A. Kind of a sandstone.

Q. Did you see such rock about the river?

A. Yes, sir; above Two-Mile Creek, along where the body was found.

Q. Did you find anything else there?

A. No, sir; not there.

Q. Well, in that immediate vicinity?

A. No, sir; not around there.

Q. Did you see any clothing?

A. Yes, sir; straw hat and a piece of a brown dress and white skirt tied up with twine and big rocks tied into that.

Q. How was that wrapped up; just show to the jury?

A. Just gathered together and the twine and the things, the straw hat right on top, and then stones inside of it.

Q. Did you see any sheet, or anything that looked like one?

A. No, sir; the white skirt was on the outside.

Q. Did you see that taken from the river?

A. Yes, sir.

Q. Where was it taken from the river?

A. Right twenty feet above Two-Mile Creek; this side of where the other remains were taken out; between both pieces.

Q. Did you see an examination made there to ascertain how the body had been severed or cut in two?

A. No, sir.

Q. Did you see where the bones had been severed?
A. Yes, sir.
50 Q. What bones had been cut off?
A. There was one part of a rib kinder hanging.
Q. How did it look?
A. Looked like it had been cut with a dull knife; something dull.
Q. Did you see where the back bone was cut through?
A. No, sir; did not.
Q. Did you see any part of the vertebræ?
A. No, sir.
Q. I believe you said that the face looked as if it had not been in the water more than 24 hours?
A. Yes, sir; pale, with a red spot over the eye.
Q. Do you remember what kind of weather it was, as to being cold or not?
A. The night before that, Thursday night, was a big wind; it blowed hard; I was working on the new reservoir at the time.
Q. The days preceding, do you remember what kind of weather, whether hot or cold?
A. It was kinder cold.
Q. How was the water in the river?
A. Water was cold; yes, sir.
Q. Of course, you don't know how long it had been in there; there was nothing from which you could say, certain?
A. No, sir.
Q. What day of the week was this?
A. It was the 28th day of the month.
Q. Do you remember the day of the week?
A. About Friday.
Q. About what hour in the day was it?
A. Between 9 and 11; no, between 10 and 11; it was noon when I left; it was in the forenoon.
Q. Did you afterwards make any search with anybody to ascertain, if possible, where that woman had been killed?
A. Yes, sir.
Q. Did you or others find a place where you supposed she had been killed?
WEBB. Objected to.
COURT. It is merely preliminary.
Q. Did you find such a place?
A. Yes, sir.
Q. When was it that you found such a place?
A. Sunday morning, the 30th of March.
Q. What year? The same year, 1890?
A. Yes, sir.
Q. Where was that place?
A. It was on the reservation, about 115 yards of a gate.
Q. What do you mean by the reservation?
A. The soldiers' business up there.
Q. You mean the Fort Leavenworth military reservation?

A. Yes, sir; it is all fenced in.
Q. Where was the point, you say?
A. At the head of a ravine, about twenty or thirty steps from a fence.
Q. Does Broadway street approach that reservation from here in town?
A. Sir?
Q. Does Broadway street come up to that reservation?
A. Yes, sir.
Q. Which end of Broadway?
A. The far end comes up to it.
Q. The north end of it?
A. Yes, sir.
Q. The north end of Broadway?
A. Yes, sir.
Q. Is there any part of that reservation fenced in?
A. Yes, sir; where this part was it is all fenced in.
Q. The fence runs in what direction?
A. Runs clean around the place.
Q. But the fence there runs in what direction?
A. Runs this way [indicating].
Q. Don't you know directions—the points of the compass?
A. No, sir; didn't pay any attention.
Q. It runs about east and west, does it?
A. Yes, sir; east and west.
Q. Now, suppose that Broadway street was extended on north across that reservation, is there a gate anywhere in that fence, in the vicinity where Broadway would run?
A. No, sir; Broadway would run right square up to the fence if it went through; it comes as far as Metropolitan avenue, and then there is a space between there and the fence.
Q. If Broadway was extended—do you remember a gate there?
A. Yes, sir, there is a gate; I would not say whether Broadway will face the gate.
Q. But there is a gate there?
A. Yes, sir; right at the end of the fence.
Q. From the point where Broadway, if it were extended, would strike that fence, where was this place?
A. 115 yards from the gate, where I first discovered the ravine, where there was blood lying on the ground.
51 Q. Describe to the jury the appearance of the point where you found blood on the ground.
A. As we came up the ravine, at the head of the ravine is a kind of bushes, and there was blood there, and the other gentleman picked up some piece of cord; the same sort of cord that was around her neck, and he gave that to me and I looked at it, and I said, "There is blood, and there has been something heavy here," and it looked as though sometning had been carried down in this gully, and I followed this blood from where I first saw it in the ravine; you could see it in chunks, and over a piece to where a muffler was lying over towards the gate to where two big spots laid about as big as a water pail.
Q. Over there, where the blood was supposed to be, what did you see besides those spots of blood?

A. I seen candy, peanuts, and piece or fragments or parts of underclothes and the muffler?

Q. Did you see anything else?

A. Not then; then I went over and I called Mike Hannon, and he says——

Q. Never mind that.

A. He was standing over towards the bushes and he kneeled down and picked up a knife sticking up out of the ground.

Q. How far was that from the point where you found the muffler?

A. Twenty feet.

Q. Where the muffler was and the blood, did you see any appearance of a struggle, or anything of that kind?

A. No, sir; it is all grass there.

Q. Did you see anything else?

A. No, sir; only the candy, peanuts, and pieces of clothes.

Q. Did you see any teeth there?

A. No, sir.

Q. Did you at any time?

A. Yes, sir.

Q. When?

A. Sutton picked them up. When I had discovered this much I told the party that I would report it, and I found George Sutton and he comes over; I told him and we went right up there.

Q. Did you leave everything as you found them?

A. Yes, sir; everything but the knife.

Q. What kind of a knife was it?

A. Common small butcher's knife.

Q. Where did you say it was?

A. Sticking in the hole with the handle sticking up.

Q. Where the muffler was?

A. No, sir.

Q. Was it where you saw the blood nearest to the gully?

A. Yes, sir, right close up to it; sticking in the little hole with a lot of leaves around it which nearly covered it; I thought it was at first a stick or a stake pin, and then I saw it was a knife, and then I threw a handkerchief around it and took it to the station.

Q. The other things you left exactly as they were?

A. Yes, sir.

Q. Who went there with you?

A. Mr. Atwood and Mr. Sutton.

Q. Who is Sutton?

A. A policeman.

Q. Who else? Was Powell along?

A. I would not say. I think either Powell or Shallcross.

Q. Was there other parties?

A. When we got on the grounds there were other parties.

Q. What did you find there when you got there with the officers, in addition to the muffler? Was the muffler still there?

A. Yes, sir.

Q. And the blood was there?

A. Yes, sir.
Q. What else? Candy, peanuts, and other things?
A. Yes, sir; candy and peanuts.
Q. And the candy and peanuts were where the muffler was?
A. Yes, sir.
Q. What else?
A. Piece of candy and clothes.
Q. What else did you see? Did you see the teeth?
A. That is all, except the teeth; George Sutton picked the teeth up.
Q. Where were the teeth in reference to the blood?
A. Right to the side. Two feet from the patches of blood.
Q. Describe about how big the patch of blood was?
A. Big as a water bucket; two spots.
Q. These teeth—which side of the blood were they lying?
A. Facing east.
52 A. They were east from the spot of blood towards the river.
Q. Towards the ravine?
A. Yes, sir; right towards the ravine.
Q. Who took these teeth away; do you know?
A. Mr. Sutton.
Q. Who took the muffler away; do you know?
A. No, sir; I do not.
Q. Who picked the muffler up?
A. Don't know.
Q. Describe the muffler—what kind of a muffler it was.
A. Didn't pay much attention; knots were tied to it with a piece of string at each end.
Q. What shape was the muffler?
A. A regular German handkerchief.
Q. Can you show to the jury the shape of it?
A. No, sir; it was that way [indicating], with knots and a piece of string on each end.
Q. Did you notice the color?
A. It was right dark red.
Q. Would you know these teeth if you saw them?
A. I suppose I would.
Q. Would you? Did you look at them?
A. No, sir; didn't have them in my hands at all.
Q. This candy that was lying around; what kind of candy was it?
A. It was mostly candy; some peanuts; stick candy and the kind what has mottoes.
Q. That is, it was mixed candy?
A. Yes, sir.
Q. You remarked that it was fresh blood?
A. It looked like fresh blood; that it had been just put there. There was no rain. It might have been there all week, but it was in places where there was clots, and you could pick a clot up and squeeze it in your fingers.
Q. Are you sure it was blood?
A. Yes, sir; it was the blood of a person or cattle or something.

Cross-examination:

Questions by Mr. WEBB:

Q. What did you say your business was?

A. Laborer.

Q. What were you doing in March of last year at the time you speak of?

A. Working for Mr. Gillfilling, at the waterworks.

Q. What were you doing on that day, Friday, that you happened to be at the place where the body was found?

A. It was right after a wind storm, and I could not work, and I was hanging around the corner where I live.

Q. Whereabouts do you live?

A. On the corner of Dacota and Fifth.

Q. This was Friday, was it?

A. Yes, sir.

Q. Did you work Thursday?

A. Yes, sir.

Q. Did it rain Thursday night?

A. I could not say whether it rained or not, but there was a big wind storm.

Q. Didn't you just say that you laid off after the rain and could not work?

A. No, sir; the wind was so strong that it blowed the planks over, and we had to quit.

Q. Was there snow as well as wind?

A. No, sir.

Q. Didn't you just say there was?

A. No, sir; did not.

Q. What did you say, then?

A. I didn't say anything of the kind.

Q. What did you say? What kind of a storm did you say it was?

A. Wind storm.

Q. Didn't you say wind and snow storm?

A. No, sir; didn't.

COURT. The witness neither testified to rain or snow storm; he said wind storm.

Q. Who asked you to go up there, if any one, to that place where the body was found?

A. There was a lot of gentlemen on the corner asked me; there was not anybody asked me to go up there.

Q. The body had been found, and you heard it and went up there with others?

A. Yes, sir.

53 Q. You say that Powell was there?

A. Yes, sir.

Q. And Marshall Murphy, Mr. Sutton, and others?

A. Yes, sir.

Q. Did you take hold of that body at all?

A. Not the first part; no, sir.

Q. Did you inspect it there by taking hold of it, or otherwise, for the purpose of seeing how it was severed?

A. No, sir; just looked down at it.
Q. Did any one examine it there to see its appearance?
A. Yes, sir.
Q. Who did that?
A. Several looked at it.
Q. Who looked at it?
A. Several looked at it when it was pulled out of the water; Powell and Sutton looked at it.
Q. About the sack that contained another part of the body; you said that was a large sack?
A. Yes, sir.
Q. Larger than an ordinary potato sack?
A. Yes, sir.
Q. I will ask you if it was such a sack as is commonly called a Government sack?
A. I never had any dealings with them; I would call it a gunny sack more than anything.
Q. Didn't you say you had heard people call it a Government sack?
A. Yes, sir; I did.
Q. How large was that sack? Tell us its length or depth.
A. I think it was about three or four feet long and about two feet wide.
Q. How wide?
A. About two or two and a half feet?
Q. What was its appearance as to being old or worn?
A. Being in the water I could not tell.
Q. State whether or not it was torn. Was it torn?
A. No, sir; there was not a hole in it, as I seen at the time.
Q. A good, strong sack, was it?
A. Yes, sir.
Q. You said something about some rocks being there, and you were asked whether some rocks were there. Where did you say rocks were found?
A. Right at the side where the body was found; at the junction; at the Rock Island junction, where the body was found.
Q. How far apart were the two pieces of the body when you discovered them first?
A. One was above Two-mile Creek and the other below it.
Q. But how far below was one and how far the other?
A. I could not tell; I never measured it; I should judge two or three hundred yards.
Q. You said in regard to one part of that body that there was a red spot over one of the eyes?
A. Yes, sir.
Q. Which eye was it?
A. I think it was the right eye.
Q. How large was the spot?
A. It looked like as big as a common marble or ten-cent piece.
Q. How was its appearance; bright or otherwise?
A. It was bright; kinder dark blue around it, but in the center it was red.
Q. Well, you looked at that head and face, did you?

A. Yes, sir.
Q. At the chest?
A. Yes, sir.
Q. Was the clothing removed so you could see the neck or chest?
A. No, sir; the clothes was over the breast, and you could only see the insides of the breast; a few buttons were open at the bottom and where it was cut.
Q. And you think from the appearance it had been in the water but twenty-four hours?
A. It would look that way if the water was warm, but as the water was cold I could not say.
Q. What was your opinion at the time?
A. Looked like not over twenty-four hours.
Q. How did it appear to you as to the length of time she had been dead?
A. Could not say that.
Q. Did it have the appearance of having been dead more than 24 hours?
A. It did'nt look like it on account of being in the water.
Q. I don't ask reasons, but only ask what the appearance was.
COURT. Is that material? Perhaps his opinion would be worth nothing on a question of this sort.
54 Q. Now, Mr. Barry, you say that on Sunday, the 30th of March, you were trying to find some point or place where this crime had been committed. At whose request did you do that?
A. George Sutton.
Q. Who was George Sutton at that time?
A. He was a private detective.
Q. And he got you to try to find—what did he want you to do?
A. He told me if there was anything in it, to look it up.
Q. Who told you that?
A. Sutton.
Q. Where was he when he told you that?
A. Where the remains were found.
Q. On the reservation?
A. Yes, sir.
Q. When was it he told you that?
A. The day she was found.
Q. That was Friday?
A. Yes, sir.
Q. Why didn't you do something Saturday?
A. I was working Saturday.
Q. So you took Sunday for that little job?
A. Yes, sir; I took a walk Sunday and followed the ravine.
Q. Who went with you when you went there first?
A. Mike Hannon.
Q. Why did you go onto the reservation?
A. Well, just taking a walk around.
Q. Where did you enter?
A. At Two-mile Creek.
Q. Is that east or west of the macadamized road leading to the fort?
A. East of the macadamized road.

Q. How many fences did you have to go over or go through in order to get to where the muffler was found?

A. Two fences.

Q. And crossed the macadamized road?

A. Yes, sir.

Q. Do you know the direction of the macadamized road from the city?

A. It is about south and west or northwest.

Q. Whereabouts is the gate which you spoke of that you found on this place?

A. One hundred and fifteen yards from the gate; pretty near facing Broadway?

Q. How far was it from where you entered the Government reservation? That is, that part of it lying west of the macadamized road?

A. About half a mile.

Q. Did you go to that gate?

A. No, sir.

Q. Then you crossed this fence and went into the field?

A. Yes, sir.

Q. Then where did you go?

A. Followed the ravine up all the ways to the macadamized road.

Q. Who was with you?

A. Mike Hannon and Tom Short.

Q. You said at the place which you describe—you spoke about a point near the fence. You said that you found a place, or some thing, near a fence. How far?

A. About twenty feet from the fence.

Q. I will ask you if that is the fence that runs westerly? I don't mean west, but runs from that macadamized road, or leads to the fort. The south fence?

A. Yes, sir; south fence.

Q. Turns to Broadway?

A. Yes, sir; facing Broadway.

Q. And you say the place you found was about twenty feet from the fence?

A. Yes, sir.

Q. On the north side of it?

A. Yes, sir.

Q. I will ask you whether you passed over the macadamized road?

A. No, sir; not at the time.

Q. Is there any opening between the point you described and the place where the Two-mile Creek crosses the road?

A. Yes, sir; there was a board broke off the fence.

Q. Whereabouts is it broke off?

A. The second board from the bottom.

Q. Whereabouts on the fence?

A. On the fence running east.

Q. Whereabouts with reference to this place you found?

A. Right across from the blood.

Q. Was that a fresh break in the fence or an old one?

A. No, sir; an old break.

Q. Now, standing there by the fence within twenty feet from where you saw this blood spot was, I ask you if you could not see all the buildings on the south of the city?

A. Yes, sir; you could.

55 Q. There is an open space between the fence and the buildings that stand on that diagonal street—Metropolitan avenue. I will ask you if there is not a highway or street on the south side of this fence that is called Logan avenue?

A. It is called the Government lane that runs along the fence; it comes in off the macadamized road.

Q. Passes along the south side of that fence and Government road to Broadway?

A. Yes. sir.

Q. Twenty feet from the fence and where you could see the buildings, I will ask you if you could not see the buildings on the south?

A. Yes, sir; you could see the tops of them; the ground is hilly.

Q. How much does it descend from the place where you say the teeth were picked up?

A. It don't descend; it is just hilly kind of ground; kinder hilly.

Q. Is not the ground there as high as along the fence?

A. No, sir.

Q. How much lower, then?

A. I should say about on a level.

Q. Then the distance from the fence, twenty feet, is not the ground level? From the fence back to this place is not there a gradual descent?

A. No, sir; I didn't understand that before.

Q. How wide was the ravine?

A. Three feet wide running all the ways down, up to eight or ten feet wide.

Q. At the place where you say somebody had been, is it not a fact that it was under fourteen inches wide there?

A. No, sir; it was not.

Q. How deep was it?

A. About a foot.

Q. Is it not a fact that it was less than a foot deed?

A. No, sir.

Q. Did you see anything inside of it?

A. Yes, sir.

Q. What did you see?

A. Chicken feathers.

Q. Anything else?

A. Chicken inwards.

Q. Anything else?

A. Pieces of twine.

Q. These were in there at the time?

A. Yes, sir.

Q. That is where you found the twine, in the ravine?

A. Yes, sir.

Q. That is where you found the fresh blood?

A. Yes, sir.

Q. Let me ask you if you didn't see some rib bones; about a half dozen?

A. Yes, sir; there were bones.

Q. Looked like those of some animal of some kind?

A. Don't think they looked like the ribs from a beef; they were pretty well dried up.

Q. Half dozen or more of those bones lying there were there not?

A. Only a couple that we picked up; I didn't see no half dozen there.

Q. How far was the head of that little ravine from the place where you say Sutton picked up the teeth?

A. It was fifteen or twenty yards.

Q. Do you mean yards or feet?

A. I should call it yards.

Q. Is it not a fact that it was less than fifteen feet?

A. I tell you I don't study that kind of business; I didn't measure it. Sutton would know the distance.

Q. While you were there did any one run a spade or shovel into the grass and cut out a piece of turf?

A. Yes, sir.

Q. At that precise place is not the distance from the head of the ravine to this place where the teeth were found less than it is from me to you?

A. No, sir.

Q. That is your present recollection is it?

A. Yes, sir.

Q. Who ran the spade into the soil and took out a piece of turf?

A. I don't know.

Q. It was done in your presence?

A. No, sir; I think it was Jack Graves, I am not positive.

Q. Was the blood there fresh also in its appearance?

A. Yes, sir.

Q. And the grass not dried up nor washed away by rain?

A. No, sir; not washed away.

Q. What did you say you found there?

A. I didn't pick up anything but a knife.

Q. Do you know who has got that knife?

A. No, sir.

Q. How large a knife?

A. A common butcher knife, about a foot long; or pretty near a foot.

56 Q. And you say the blade of that was driven into the ground?

A. It was in a hole with a lot of leaves, dried grass, and stuff.

Q. Was it rusty?

A. I would not say; it looked like rust and like dried blood.

Q. What kind of a handle?

A. Black walnut handle.

Q. How long was the handle?

A. The handle was three or four inches, I guess.

Q. How long was the blade?

A. I could show you better than I could tell you.

COURT. Just give your best recollection.

A. It was about a foot or a little over.

Q. You left everything there on the spot except the knife, and then went back town, and then went to Atwood and Sutton?
A. Yes, sir.
Q. When you went back a good many were there?
A. Yes, sir.
Q. All over that ground?
A. Yes, sir; the crowd followed us up.
Q. And you say Sutton picked up the teeth?
A. Yes, sir.
Q. Did you see him?
A. Yes, sir.
Q. Did you know who put them there?
A. No, sir.
Q. Did you know when they were put there?
A. No, sir; don't know.
Q. Don't know whether they were put there that morning or not?
A. No, sir.
Q. You say there was a muffler there?
A. Yes, sir.
Q. And you described it?
A. Yes, sir.
Q. Who took that muffler away?
A. I could not exactly tell who picked it up; so many were there.
Q. You have stated that at one of those blood places, but whether where the teeth were I don't know; but at one of those places you said the blood looked as though it was just put there; which place do you mean?
A. In the ravine.
Q. And the blood there where the teeth were you say was as much as the top of a water bucket?
A. Yes, sir; two spots.
Q. Do you know whether blood had been carried there in a vessel and emptied out or not?
A. No, sir; I do not.
Q. You say there were two spots?
A. It looked like something lying there, and bled just the same as a dog; and somebody shot him and let him lie.
Q. I didn't ask you that. Was it just one spot?
A. It was two spots.
Q. Were the two spots separate from each other?
A. Yes, sir.
Q. How large was one?
A. One as big as a water bucket and the other not so big.
Q. How close together?
A. About a foot apart, or a little over a foot and a half.
Q. And they were just similar?
A. Yes, sir.
Q. Two spots of blood?
A. No, sir; there was blood splattered all around there on the grass.
Q. I thought you said that was over in the ravine?
A. There was in the ravine too; there was blood flowed around on the leaves and grass; it looked as if there was a struggle.

Q. You were asked to see on Friday—were you asked to find the blood places?

A. No, sir; to look around and see what I could find.

Q. How far was it from the macadamized road over the reservation to where the body was found?

A. Can not tell you.

Q. You can not tell whether it was a short distance or not?

A. Pretty near a mile.

Q. Is there any road leading direct from that road where you cross the Government highway to this fence?

A. No, sir; not straight across.

Q. How far was it from where you crossed that macadamized road to the place where you say the blood spots were?

A. I came up through the ravine——

Q. I didn't ask you that. What was the distance from where you crossed the macadamized road to where you say you found the blood spots?

A. I didn't cross the macadamized road at all.

57 Q. You have been on that macadamized road, have you not?

A. Yes, sir.

Q. And you said there was a ravine to the fence?

A. Yes, sir.

Q. And you went up the ravine?

A. Yes, sir.

Q. I will ask you if upon that macadamized road that you went, what is the distance from that point where you crossed the road and the place where that blood was?

A. I should judge about a quarter of a mile.

Q. That is your best judgment?

A. Yes, sir.

Q. Starting now, at the place where the body was, and taking a heavy body weighing one hundred pounds, more or less, in a sack, and carrying it to the river, how many fences would you have to get over or gates to go through?

Q. If they went down the road, only one gate.

Q. Where is that gate?

A. Facing Broadway.

Q. Then they would have to go west 115 yards to go out of the gate and then have to go backwards a mile and a quarter to the river?

A. They would not have to go that way.

Q. How many fences and gates would they have to cross and go through?

A. Two, if they went through the ravine; but they could have waded through the creek.

Q. And you say there were three packages or parcels in the river?

A. Yes, sir.

Q. One contained the head and trunk and both arms, and the other contained the old clothing, and the other contained one of the legs and part of the body of the woman?

A. Yes, sir.

Q. In your judgment, how many persons would it take to remove those things from the spot where the blood was found to the river?

Mr. ADY. I object to that question.

COURT. Objection sustained.

Q. You stated that you found some other things there besides the knife and pieces of rope and peanuts and candy?

A. Yes, sir.

Q. What else did you find?

A. Nothing, right there.

Q. Where did you find them then?

A. I found them coming down towards the fort road an iron-handle penknife covered with blood.

Q. Whereabouts did you find it?

A. Right at the edge of Twomile Creek; right on the bank; between the Rock Island track and the dummy line.

Q. How far from the place where the teeth were found?

A. Away down the river.

Q. How far was it?

A. I can not tell you the distance.

Q. A mile and a quarter or mile and a half?

A. Yes, sir; half a mile or three quarters.

Q. What else did you find at the place the teeth were found besides the articles I have mentioned?

A. Nothing at all; the big butcher knife is the only thing I picked up.

Q. You said you found a part of her dress?

A. Her things were lying there.

Q. Did you not say that you found a part of her dress?

A. No, sir; I did not.

Q. Then you say that now?

A. Yes, sir; there they laid; that stuff laid there. Powell picked it up himself.

Q. What stuff laid there?

A. Pieces of candy, peanuts, muffler, pieces of dress, and underclothes.

Q. Now, what kind of a dress?

A. Kind of a black silk or brown; it was dark.

Q. How large?

A. It was in separate strips half an inch long.

Q. How many strips?

A. Half a dozen.

Q. Who picked them up?

A. Powell and Mr. Schindler, I think; and several parties around there picked things up and I walked away and didn't pay any more attention.

Q. Mr. Barry, is not that a place there where those things were found, where matter caught up by winds would naturally get into that place, on account of it facing the street there?

A. Yes, sir; if the wind was blowing I should think so; the wind never blowed them though.

58 Q. The wind blows in that locality does it not? Why did you say you could not work that Friday?

A. I didn't say I quit work that Friday; we had to quit on account of the storm and bad weather.

Q. Didn't you talk about the wind blowing?

A. That was Thursday night.
Q. Thursday night?
A. Yes, sir; and we didn't work Friday morning.
Q. How heavy was the wind Thursday night?
A. It blowed so hard that it blowed the top off the reservoir where the water comes through.
Q. How far was that from the place where the teeth were picked up?
A. Well, that is away to the river.
Q. How far is it?
A. I never measured it.
COURT. This witness has testified to that fact about five times.

Redirect examination.

Questions by Mr. ADY:

Q. Had there been any rain during that week, if you remember?
A. No, sir.
Q. Or snow?
A. No, sir.
Q. Did I understand you to say to Judge Webb that the point where this blood you say was at the head of the ravine where you pulled up the knife. Did I understand you to say that that was just fifteen feet from the fence?
A. I should take it to be about that from the head of the ravine; from the head of the ravine going up towards the fence, facing the fence; the ravine runs right towards the fence and stops.
Q. The point where the teeth and the blood and the muffler, etc., were found, about how far was that from the fence, would you say?
A. From the fence about fifteen or twenty feet; the muffler was the last thing.
Q. Are you certain about the distance?
A. Don't know; never measured.
Q. Did you ever stand there and look over towards town and see the houses?
A. No, sir.
Q. Following this ravine—following the line of the ravine until you come to the road that goes over to the fort, what creek does it run to, if any?
A. Twomile Creek.
Q. It crosses right there?
A. Yes, sir.
Q. And there is a high bridge you can go under?
A. No, sir; a wagon road goes under the bridge.
Q. And there is a railroad bridge goes under there?
A. Yes, sir; the narrow-gage track runs under that.
Q. When you are down in that ravine approaching Twomile Creek, can you see the city of Leavenworth?
A. No, sir.
Q. Can you see the fort?
A. No, sir.
Q. When you reach Twomile Creek can you see houses?
A. No, sir.

Q. The hills are precipitate on both sides?
A. Yes, sir.
Q. You say you went up Twomile Creek from where the body was found?
A. Yes, sir.
Q. You went up to what point?
A. Right straight through the creek and on the track.
Q. You went up Twomile Creek by the narrow-guage track?
A. Yes, sir.
Q. And then where did you turn from Twomile Creek?
A. I turned—I kept right up the creek until I came to the ravine and then followed the ravine up clean to the head of the street.
Q. Why did you do that?
A. Because there were footprints of a heavy person where they had sunk down into the banks.
Q. You were following the footprints?
A. Yes, sir.
Q. And you followed them up the ravine?
A. Yes, sir.
Q. They led you to this point?
A. Yes, sir; went straight to the head of the ravine.

Recross-examination:

Questions by Mr. WEBB:

Q. I did not understand you before, and I don't now. This
59 wagon road; there was a bridge across Twomile Creek on the macadamized road?
A. Yes, sir.
Q. And going up Twomile Creek did you pass under the bridge?
A. Yes, sir; on the narrow-guage track.
Q. On each side of that military road at that time; I will ask you whether there is a fence there?
A. On each side, yes, sir; there is a fence.
Q. So that you came up to that bridge, followed the road up, crossed the macadamized road into that field, and then followed up the ravine to the place you spoke of?
A. Yes, sir.
Q. Could you climb over the fence?
A. Yes, sir.
Q. Would you have to go over the narrow-guage road?
A. At this time there was no fence on the right-hand side going to the fort.
Q. Then you would not have to follow the ravine, would you?
A. Yes, sir.

GEORGE SUTTON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:
Q. Is your name George Sutton?
A. Yes, sir.
Q. You reside in Leavenworth?
A. Yes, sir.

Q. How long have you resided here?
A. 15 years.
Q. How many years?
A. 15 years, I guess.
Q. What is your occupation?
A. Policeman now.
Q. Did you know Mrs. Mettman in her lifetime?
A. Yes, sir; I saw her many times.
Q. Knew her by sight?
A. Yes, sir.
Q. Do you remember her disappearance from the community here?
A. Yes, sir.
Q. Did you get a notice some day in March, a year ago, that a body had been found in the Missouri River?
A. I was summoned on the coroner's jury at the time.
Q. Did you go down to the river there?
A. Yes, sir.
Q. You may describe to the jury specifically what you found there?
A. We found a part of the body at one place and then up the river, probably 150 yards from there, found another part.
Q. The first fragment of the body you found, what was it?
A. The upper part.
Q. Where did you find that?
A. Lying in the water at the bottom of the river, just at the edge of the water.
Q. Which side of Twomile Creek?
A. South side.
Q. Did you see it drawn from the river?
A. I helped draw it out.
Q. You say that was the upper part of the body?
A. Yes, sir.
Q. Was there any clothing on the body?
A. Yes, sir; had a dress and undershirt.
Q. Dress and shirt?
A. Yes, sir; and a black shawl.
Q. Did you notice the hair?
A. Yes, sir.
Q. Was it down?
A. I think not; I think it was done up at the back of the head.
Q. How much of this body protruded before you drew it out?
A. There was one hand.
Q. Do you remember which hand?
A. No, sir.
Q. Could you see any other portion of the body at that time before you had taken hold of it?
A. No, sir; think not; it seems to me like you could see a part of the undershirt or dress.
Q. What was attached to it besides the clothing?
A. There was string around the neck and a rock.
Q. What kind of string was that?
A. Twine; something like hemp twine or sack twine.

Q. What did you say was attached to the string?

A. A stone; a stone about that long and that wide; a flat stone [indicating].

Q. How was the stone attached to the body?

A. Think the stone was slipped inside the shawl and the shawl was on the body around the shoulders and tied and the stone was slipped down inside the shawl.

60 Q. Was this fragment of the body standing upright in the water—did you notice?

A. No, sir; it was lying on the back.

Q. Face up?

A. Yes, sir.

Q. How was the face as to being discolored or otherwise?

A. The face was not much discolored; I think one eye was; dark blue around the eye.

Q. Then you say you found another package containing something?

A. I found two more packages up the river.

Q. On the other side of Two-mile Creek north from where you found the first, you found another fragment of the body?

A. Yes, sir.

Q. How was that arranged?

A. That was in a gunny sack.

Q. Describe to the jury what kind of a sack that was?

A. It was a gunny sack which they put feed in, about two feet and a half or three feet long, probably.

Q. And about how wide?

A. 18 inches.

Q. Have you seen such sacks before?

A. Yes, sir, I have seen sacks before like that.

Q. Where did you see them commonly, if any place?

A. Such a sack as oat*hs* are sent in; I saw the same sacks like it afterwards said to be oat sacks.

Q. Were there any marks on it, or any peculiarity about it?

A. I don't remember what mark was on the sack; don't remember.

Q. What was in this sack, Mr. Sutton?

A. Part of the body; one of the limbs or legs.

Q. Anything else?

A. Yes, sir; there were some entrails out of the body.

Q. Then you found another package. What was that?

A. Near that place found a package of underclothing.

Q. What was it and how was it arranged?

A. Two or three skirts; one heavy under skirt and another skirt looked like to me as if it were made of grey blanket stuff and some other articles of clothing there; white clothes and a white skirt and all wrapped up in the white skirt and tied up.

Q. These, you say, were wrapped up in the white skirt and tied up?

A. Yes, sir; this other clothing.

Q. Any weights in there?

A. Some stones.

Q. Did you see a hat anywhere around there?

A. Yes, sir; a woman's hat; the hat was found near there somewhere; I know we had a hat there; a black straw hat.

Q. You saw those pieces all taken from the river and aided in doing it?

A. Yes, sir.

Q. After they were taken from the river what was done with them?

A. They were taken from there to the Mettman residence.

Q. This was on what day of the week?

A. I think it was Friday.

Q. What disposition was finally made of the parts of the body?

A. It was taken over to the undertakers and afterwards fixed for burial and taken to the graveyard.

Q. Do you remember when the burial took place?

A. I remember the time it took place, but don't remember just how long it was afterwards.

Q. The funeral took place from the Mettman residence, didn't it?

A. I think it did.

Q. And this was the same body that was buried that was found in the river?

A. It must have been; I didn't see it taken away from there, but I think it was.

Q. Did you recognize the remains yourself?

A. No, sir; the features looked familiar to me but I could not call the name at that time, but I made the remark that I knew the face, but could not say who it was; I remembered afterwards the lady.

Q. On the Sunday following that did you see a place out on the Government reservation where there was something supposed to be blood and articles found?

A. I did.

Q. Describe to the jury what you saw there and how you came there?

A. I had made arrangements with a man by the name of Barry; him and me both were looking it up; found out it was a bad case, and
61 I told him to go upon the reservation, he was well acquainted, and look around, and if he found anything to report to me, and he came down that forenoon and told me that he had found some blood——

COURT. Never mind what he said. Just state what you did.

A. I went up there with the county attorney; I took the county attorney and officer Powell and Mr. Murphy, and went up there and found this place that he described to me.

Q. Describe to the jury the appearances that you saw there on the ground?

A. There was one place there—there was a gutter, a ravine came up and at the head of the ravine we found considerable blood there about that place and about thirty yards from there found blood on the grass; spots of blood, probably as big around as a hat, and around about there was blood sprinkled around on the grass and near the place there I picked up some teeth, false teeth.

Q. What else did you see and pick up?

A. I saw a muffler lying there and some kind of cloth with twine tied around it; Mr. Powell picked it up.

Q. Powell picked that up?

A. Yes, sir.

Q. How near was that blood?
A. Eight feet.
Q. How near was this set of teeth to the blood?
A. Think it was about eighteen inches; two feet may be.
Q. Which direction from the spot of blood?
A. It was in a northerly direction down the hill; there was a kind of a slant there.
Q. What did you do with the teeth?
A. I kept them some time and then turned them over when I went to leave the city, to Mr. Atwood, the county attorney.
Q. I will get you to look at that (exhibiting teeth)?
A. They are the same ones.
Q. You recognize them as the same set of teeth you picked up there?
A. Yes, sir.
Q. Do you know how they came there, Mr. Sutton?
A. No, sir; do not.
Q. This muffler that you saw there, did you ever see it afterwards?
A. No, sir.
Q. See it in the possession of Mr. Doane afterwards?
A. No, sir; did not.
Q. Did you ever see it afterwards anywhere?
A. No, sir; I didn't after I turned it over to Mr. Atwood; I turned it over to Mr. Atwood.
Q. Was that the same one that was turned over to Mr. Doane?
A. Yes, sir.
Q. Did you notice any peanuts or candy or anything of that kind?
A. Yes, sir; there was some there that was picked up.
Q. Did you notice any fragments of dress goods?
Mr. WEBB. Objected to.
Q. What else did you notice?
COURT. Mr. Ady recognizes the fact that his questions are leading, but sometimes we make better progress that way.
A. Yes, sir; I found pieces there that looked like the dress found on the body.
Q. Like that that was on the body. About how a large a piece?
A. In a strip like it was torn loose.
Q. Where did you find that?
A. Right near where I found the muffler.
Q. How near that spot of blood?
A. Ten or 12 feet.
Q. How near did you say?
A. Probably ten or twelve feet; right near the place.
Q. Did you see other pieces picked up or not?
A. There was several pieces picked up there by parties.
Q. Did you, during the time of the cororner's inquest, or any other time, observe how the bones had been severed in cutting this body into pieces?
A. No, I didn't examine the body enough to find out about that.
Q. You don't know whether it has parted at the joints or how?
A. Could not say.
Q. Who did examine it for that purpose?
A. Don't know, unless it was some of the physicians here in the city; I believe it was.

62 Cross-examination:

Questions by Mr. WEBB.

Q. You say you are a policeman now, Mr. Sutton? What were you a year ago last March?

A. Deputy sheriff then.

Q. Anything else then?

A. Don't know that I was.

Q. You say that on Sunday you were there on the Government reservation—using my words and not yours—and you say before that you had made arrangements with Barry to do something, did you?

A. Yes, sir; I told him.

Q. I didn't ask you what you told him. What authority had you to make that arrangement with Barry about that matter?

COURT. You need not answer that question. I do not see that it tends to throw any light upon the subject.

Mr. WEBB. I am confident that this is a put-up job; that these witnesses have been drilled upon several different theories; this is about the third or fourth theory.

Mr. ADY. I object to that statement by counsel before the jury.

Mr. WEBB. Of course I submit to the ruling of the court, but I think I have a right to show that if any of these witnesses have a reason to give testimony, that it is within the fair scope of cross-examination to show their motives, their means of knowledge, and their purpose.

COURT. You have established the only thing that could possibly do you any good. You asked him if he made arrangements with Barry, but when you go into the question of authority I can not see that it is competent.

Q. When was the arrangement made with Barry?

A. About the time the body was found.

Q. That was Friday?

A. Yes, sir.

Q. And he came to you again on the Sunday following?

A. Yes, sir.

Q. What were you doing, if anything, on Saturday?

A. I was here in the city; don't know as I was doing anything particular.

Q. Did you do anything about making a discovery?

A. Yes, sir; I was looking up around the city.

Q. What time was it on Sunday when you were notified by Barry that something had been found?

A. It was near ten or eleven o'clock.

Q. And then you went with others directly up there, did you?

A. Yes, sir.

Q. County Attorney Atwood went with you, you say?

A. Yes, sir.

Q. And Murphy, a policeman or marshal, I don't know which?

A. Yes, sir; policeman at that time.

Q. Now, I didn't quite get your answer, and I want to ask you. You said that in a little ravine you saw blood. I want you to tell me just what you saw and where the ravine was?

A. That ravine is on the Government reservation north of the city, but don't know exactly the distance it is from the city limits; I didn't measure the ground, but it is probably 150 yards north; may be a little more or less.

Q. When you say from the city, do you refer to the buildings along the line of the street directly south, or do you have reference to the fence along there?

A. That fence—no, sir—is about one hundred feet from the head of the ravine where the blood was discovered.

Q. Now, the head of the ravine, you say, is one hundred feet from the fence?

A. Yes, sir.

Q. North?

A. Yes, sir; nearly north; a little west of north from the fence.

Q. How large is that ravine at the head?

A. Not very deep; probably two feet or a little more there.

Q. How wide?

A. Probably it is six or seven feet wide.

Q. That wide at the head of the ravine?

A. Probably five or six feet at the head of the ravine.

Q. What did you say you found there near that ravine?

63 A. In the ravine there was blood; considerable blood. That is all we found right there in the ravine.

Q. What did you find in the ravine, if anything?

A. We found blood there.

Q. Anything else?

A. I didn't find anything else there.

Q. Is it not a fact that there were a lot of bones there that looked like beef ribs?

A. There had been some chicken feathers around there at one time?

Q. I asked you if there was not some ribs; rib bones?

A. Don't remember whether there were any ribs or not.

Q. How far was that from the place you picked up the teeth?

A. About thirty steps east.

Q. Is it not a fact that it less than fifteen feet?

A. No, sir.

Q. What was found there, or near there anywhere, where the teeth were found, except the teeth?

A. This muffler and this candy was scattered around.

Q. How much blood was there there?

A. There was a patch of blood there probably as big around as a woman's hat.

Q. What else, if anything, besides the teeth and muffler and this candy?

A. There was some pieces of dress goods picked up.

Q. You say eight feet from there was where the muffler was picked up?

A. About eight feet, I think.

Q. Whereabouts was the dress goods?

A. Near the muffler.

Q. How many pieces of dress goods?

A. Two or three pieces.

Q. How large?

A. Small pieces, in string like; about that long [indicating].

Q. Who picked them up?

A. I picked up one or two, and some one else (probably Powell) picked up one or two pieces.

Q. Do you remember what kind of a day that was, Mr. Sutton?

A. The day we found the stuff there?

Q. Yes, sir. What kind of a day?

A. I think it was a nice, pleasant day.

Q. How was the Saturday before; what kind of weather then?

A. I don't remember just the Saturday before.

Q. How was it on Friday, the day the body was found; what kind of weather was it?

A. It was a cold, chilly day, and a little windy, and it was not a very pleasant day; I know we had overcoats on.

Q. Do you remember whether it rained any between Wednesday and Thursday?

A. I think not.

Q. Do you know whether it rained that week between Tuesday and Sunday?

A. Don't think there was any rain.

Q. Do you remember whether there was rain or not?

A. Don't remember.

Q. I will ask you if on that day you were doing work up there, if you were doing anything in an official capacity; whether you were there as deputy sheriff or simply there as a citizen?

A. I was deputy sheriff. After the finding of the body there I was not taking charge of the work, and I concluded I would see just what I could find.

Q. I will ask you if you were not acting as a private detective at that time?

A. No, sir; not particularly so.

Q. Were you employed by Mr. Atwood or engaged by him to do any work in the case?

A. Mr. Atwood had spoke to me and asked me to do what I could.

Q. When did he do that?

A. After the body was found; I don't know just what time, but it was directly after; a day or two probably.

Q. Do you remember how many pieces of dress goods were picked up there on that day?

A. Two or three I know of; I had them in my possession; I don't know; I think there was two or three, or three or four.

Q. Were any of them different from the pieces you picked up?

A. No; I don't know as they were.

64 Q. What kind of material was that? What kind of goods that you picked up?

A. There was one of the pieces, I remember, it was something like alpaca; some kind of dress goods.

Q. Black?

A. I don't know whether it was or not.

Q. What did you do with it?

A. I turned it over with the other things to the attorney there.

Redirect examination:

Questions by Mr. ADY:

Q. Mr. Sutton, you were an officer at that time and had been for years in Leavenworth?

A. Yes, sir; since 1883.

Q. And Mr. Atwood was county attorney of Leavenworth County?

A. Yes, sir.

Q. And had the case, if it did not occur on the reservation, for the State? It was Atwood's case if it did not occur on the reservation?

Mr. WEBB. Objection.

Mr. ADY. I want to show in this case that it was some of Mr. Atwood's business to look up this case.

COURT. It was the business of every person, if he desired, to interest himself.

Recross-examination:

Questions by Mr. WEBB:

Q. Mr. Sutton, with reference to the teeth picked up there on the ground, let me ask you what day it was you picked them up?

A. The day I found the teeth; the same day that the teeth were found.

Q. Of course you did. What day of the week was it?

A. I think it was Sunday.

Q. Is it not a fact, Mr. Sutton, that after the day you went there with Powell, that the next day you went up there and then found the teeth? Is not that the fact?

A. No, sir.

Q. I want you to speak so that I can hear you.

A. No, sir; it was the day I went up there with the gentlemen from the police station.

Q. How many days were you up there?

A. Once or twice.

Q. What days?

A. Don't know when it was.

Q. Who was there with you at the time you picked the teeth up?

A. Attorney Atwood and Mr. Powell and Mr. Murphy.

Q. Anyone else?

A. I don't think there was anyone else right there at the place; there were several around there, but not right there.

Q. Was not that Monday instead of Sunday?

A. I think it was Sunday; if I remember right it was Sunday.

Q. As a matter of absolute recollection do you think it was Sunday, or you may be mistaken and it was Monday?

A. I have always held that it was Sunday.

Q. I am not asking you what anybody else tells.

A. I am not saying what anybody else tells. I say it was Sunday. I have always held that it was Sunday.

Q. Where did you get into company with Atwood that day?

A. At the police station.

Q. Was Mr. Atwood at the police station on Sunday?

A. He was there that morning.

Q. One question I forgot to which my attention was directed afterwards, I want to ask you about. The Government counsel after drawing your attention to the teeth, and after you identified them as being the ones you picked up, asked you the question if you knew how they came to be there. What was your answer to it?

A. How they came up there? I said that I didn't know.

Q. Had any arrangement been made between you and Mr. Barry, or anyone else, by which anything was to be placed upon the ground to be afterwards found?

A. No, sir; there was not.

JAMES DOANE, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Do you remember the occurrence of Mrs. Mettman's death?

A. I remember when the body was found.

65 Q. You were holding what position in this city?

A. Chief of police.

Q. And how long did you continue to hold that place? Up until what time?

A. Until last August.

Q. Who was your successor?

A. Mr. McGahey.

Q. About the time the body was found was there any articles turned over to you that were supposed to have been found on the reservation?

A. There was.

Q. What were they?

A. There was a muffler turned over to me that I took to Mrs. Rautzahn that she identified——

Mr. WEBB. Never mind that.

A. There was a muffler.

Q. Who turned that muffler over to you?

A. Nobody; Mr. Atwood told me to go and get it; told me where it was.

Q. Where did you find the muffler?

A. In Mr. Atwood's and Fenlon's office.

Q. It was in Mr. Atwood's possession?

A. Yes, sir.

Q. And you took the muffler that Mr. Atwood called your attention to and you exhibited that to who?

A. To Mrs. Mary Rautzahn.

Q. Was there anybody present when you exhibited it to Mrs. Rautzahn?

A. Yes, sir; Tracy Mace.

Q. Who was he?

A. An officer of the city, then.

Q. Anyone else.

A. My wife.

Q. Was Mr. Powell present?

A. I didn't see him, if he was; don't remember.

Q. You may describe to the jury that muffler.

A. The muffler was a merino muffler; it was probably about a foot square, and had been cut bias, and looked like it was worn around somebody's neck.

Q. Was it figured in any way?

A. Yes, sir.

Q. What color?

A. It resembled a Paisley shawl; something of that kind.

Q. What color was it?

A. It was different colors; it was variagated colors.

Q. What was the basis of the colors?

A. I think it was brown.

Q. What were the figures?

A. They ran in that shape (indicating); like an interrogation point or the rim of a man's ear. It is what is called a Paisley pattern.

Q. What color were the figures?

A. They were variagated; different colors.

Q. You say you exhibited that to Mary Rautzahn?

A. I did.

Q. And the one you exhibited to her was the one you got from Mr. Atwood?

A. Yes, sir.

Q. You didn't know where it came from?

A. I did not.

Q. What else was turned over to you by Mr. Atwood about the time the body was found?

A. I don't remember anything else being turned over to me.

Q. Was not a sack and some clothing turned over to you?

A. I went down to the undertakers and ordered them up to the police station what I found there after the body was taken to the Mettman house.

Q. Do you know what became of those things?

A. I left them in the possession of Mr. McGahey when I left the office.

Q. The muffler?

A. Everything that belonged to the case, except the papers that Mr. Atwood got.

Q. Did you get the butcher knife that was supposed to have been found down there?

A. I don't remember the butcher knife.

Q. Did you get the set of teeth?

A. No, sir; there was a lot of things, a false mustache, etc.

Q. The false mustache, who delivered them to you?

A. Mr. Murphy.

Q. E. C. Murphy?

A. Yes, sir; he was one of my officers.

Q. Were they like these?

A. These are the mustaches, or resemble them very closely.

Q. I believe you were not present when the body was taken from the river?

A. No, sir; I sent officers up there and staid in the office.

Q. Were you out on the reservation when these things were found?

A. No, sir.

66 Cross-examination:

Questions by Mr. WEBB:

Q. Mr. Doane, all the things that were found, you say, you turned over to Mr. McGahey?

A. Yes, sir; everything in the office.

Q. When did you do that; at what time?

A. I think it was on the 9th of August.

Q. Have you seen those things since you came here?

A. I have not.

Q. You described that muffler as being what is known as a merino?

A. Yes, sir; that was my impression.

Q. How large did you say it was originally?

A. It was about sixteen or eighteen inches; it was bias across; it was a muffler cut in two the long way.

Q. It was, then, one-half the original? You say it was half the original muffler and had been sixteen inches square and cut diagonally one-half of that?

A. Yes, sir; one-half.

Q. Did you inspect it so as to judge how long it had been in use?

A. It looked as if it had seen service.

Q. A good deal of service or only a little?

A. I don't know about that; you know it depends upon usage.

Q. Were you present when it was found?

A. No, sir.

Q. Then the first you know of it was when you got it at Atwood's office?

A. Yes, sir.

Doctor C. B. GUNN, a witness on behalf of the Government, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is C. B. Gunn?

A. Yes, sir.

Q. You reside in Leavenworth?

A. I do.

Q. How long?

A. Eight years.

Q. What is your occupation?

A. I am a dentist.

Q. Dentist, you say?

A. Yes, sir.

Q. I will get you to look at that, doctor. Did you ever see that plate of teeth before?

A. I did.

Q. When and where first?

A. When I was asked to go with Mr. Atwood and the Kansas City Times representative out to the burying ground.

Q. Did you go to the burying ground?

A. I did.

Q. What was done when you got there?

A. The remains were taken up and the teeth tried in the mouth.
Q. The remains of whom?
A. What I was led to understand was Mrs. Mettman.
Q. What was the condition of the mouth at the time you went there?
A. The mouth seemed to be in a fair condition for a dead person; there was no decomposition or anything of that kind.
Q. How was the face as to discoloration at that time?
A. It seemed to be in a fair state of preservation.
Q. Did you fit those teeth in the mouth of the corpse that was taken up?
A. Yes, sir.
Q. Which plate of teeth?
A. Upper.
Q. You may state to the jury whether that set of teeth did fit in the mouth of the corpse?
A. I should say the teeth were made for that mouth.
Q. What evidence did you find of perfect adaptation of the teeth to that mouth?
A. Perfect adaptation.
Q. Were the lower teeth natural or false?
A. Natural.
Q. You may state to the jury how the articulation was?
A. The articulation was perfect.
Q. Did you find any indentions of protuberances on the gum to which there were corresponding depressions there on the plate?
A. I did.
Q. You may state to the jury whether that was perfect?
A. That was perfect.
Q. Now, doctor, you have fitted a great many set of teeth?
A. A few.
Q. A great many, have you?
A. Yes, sir.
Q. How many years have you been at it?
A. Fifteen years.
Q. How long in Leavenworth?
A. Eight years.
Q. You may state to the jury your opinion, as an expert, upon the fitting of teeth, whether or not these teeth belonged to this person in her life-time?
67 A. I should say the teeth were made for that mouth.
Q. Have you any doubt whatever? You saw the corpse that was exhumed?
A. Yes, sir.
Q. Did you see that it was a dismembered body?
A. Yes, sir.
Q. What portion of it did you see?
A. I saw the upper portion of the body and one of the legs.
Q. How much of the upper portion of the body was there?
A. Well, I should judge from the ribs up to about here (indicating).
Q. What was the appearance as to having been cut off?
A. I did not notice particularly, but it seemed to have been cut across that way (indicating).

Q. Was it the body of a male or a female?
A. I should judge it was the body of a female from the appearance.
Q. You didn't know Mrs. Mettman in her lifetime?
A. Do not remember of having seen her at all.
Q. What was her appearance as to age?
A. Well, my judgment was that she was probably fifty-five.
Q. Who opened the grave for you?
A. The sexton.
Q. Was the undertaker present?
A. Mr. Carthouse was there; an undertaker.
Q. Do you know whether it was the same undertaker that prepared the remains for burial?
A. That I could not say.
Q. Do you remember of hearing of the killing of Mrs. Mettman and the discovery of the dismembered body and the burial of it?
A. Yes, sir.
Q. You were not at the funeral, were you?
A. I was not.
Q. How long was this after that?
A. I could not say.
Q. About how long? About the same time, or before or after, or how?
A. It might be two days or ten days; I don't remember; it was probably a week.
Q. Who all did you say went with you?
A. Mr. Atwood and the representative or the Kansas City Times, Mr. Carthouse, and the driver.

Cross-examination:

Questions by Mr. WEBB:

Q. It was the time I was going to ask you. You say you are unable to fix the time you learned of her death?
A. No, sir; can not state exactly.
Q. At whose request was this done?
A. Mr. Atwood spoke to me about it.

Doctor M. S. THOMAAS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is M. S. Thomas?
A. Yes, sir.
Q. And you reside in Leavenworth?
A. Yes, sir.
Q. How long?
A. Since 1856.
Q. Your profession?
A. I am a physician and surgeon.
Q. Were you present at the post-mortem examination of Mrs. Mettman?
A. I was.
Q. You may describe to the jury how that body was dismembered; that is, the manner in which it was cut.

A. The body was cut across in the loin; the incision was just touching the lower rib; the condere of it; across near the breast bone, directly across the body, and the spine had been sawed just at the lower dorsar or the lower part of the vertebre; that brings it just below the chest and the abdomen; that is, the chest immediately below the diaphragm; there was then an incision or cut commencing at the breast bone, running immediately down the middle line of the body onto the pelvic bone, just a little to the right of the centre of one-third or half an inch *inch*, running into the pulva of the woman; and then there was an incision from the breast near that [indicating], upper part of the body and the left leg; the contents of the abdomen and the right leg were not present with the body at that time; on this left leg was a large deep wound about eight inches in length around over the hip joint.

Q. A cut?

A. A cut. It was the intention to take the leg off at the joint; that was abandoned, and it was sawed through the pulvis and at the narrow part, taking the leg off with that portion of the flank of the body or quarter.

68 Q. Did you see where the vertebre had been cut through?

A. Yes, sir.

Q. And what other bones were cut?

A. I saw where they had cut; it ran through the chest and near the condere of lower rib and where it ran across behind the false rib and also where it had gone through the front part of the pelvis bone and also where it had gone through the back part of the pelvis.

Q. Do you know from your examination with what sort of an instrument those bones were cut through?

A. I know it was a saw.

Q. What sort of a saw, doctor, would do that work?

A. I was just going to remark that I examined very particularly the manner that the saw had gone through.

Q. How is that?

A. I say that I examined very particularly the saw marks and found it to be done with a very fine instrument; that is, a fine-toothed saw, and one that cut very keenly.

Q. Would any saw, that is, a fine saw, without a stiff back, have done the work, do you think?

A. A very narrow or limber saw would not; it was probably a stiff back saw, probably a tenet saw or a surgeon's saw or butcher's saw; something that would prevent the blade from giving.

Q. How would a carpenter's tenet saw do?

A. The remark, such as a tenet saw, was what I said; that is, a tenet saw was what I said at first.

Q. Did you discover any wounds on the head of that person?

A. Yes, sir; in front there was a contusion over the right eye and a clot of blood surrounding the right corner of the eye; that was all the appearances we noticed at the front until the scalp was removed; that is, as to the head.

Q. And then what did you find?

A. We found that the back, after the scalp was removed and the top of the scull removed, we found that it was fractured behind; a large frac-

ture running across the back of the head, and there was a clot, a large clot of blood under the scalp at that point, and there were several fractures running from this large fracture on the back of the head, making two or three pieces, or fragments; and then there was found a bullet hole on the left side about two inches back of the eye.

Q. A bullet hole?

A. Yes, sir.

Q. In the back of the head?

A. Yes, sir; in the back of the head, two inches back of the left eye.

Q. How? About so?

A. That is rather more than two inches from the left eye; it was measured two inches from the left eye back.

Q. That was a bullet hole?

A. Yes, sir.

Q. Did you see the point of exit of that bullet? What was your judgment as to whether that was the point of entrance of the bullet?

A. Of the bullet?

COURT. Whether that was the point of entrance?

A. All the edges were drawn in, and from all appearances it was the entrance of the bullet.

Q. Did you find the point of the exit of the bullet?

A. No, sir.

Q. Did I understand you that the scalp was considerably crushed on the left side of the back of the head?

A. It was; the back part of the head was fractured clear across from left to right.

Q. In your judgment what kind of an instrument could have inflicted that wound?

A. The wound on the back of the head?

Q. Yes, sir.

A. It was some very heavy instrument; some obtuse instrument.

Q. Was this bullet hole within this crushed place?

A. No, sir; it was over in front.

Q. You may state to the jury whether or not in your judgment the crush was sufficient to produce death?

A. It was.

Q. You may state whether or not, in your judgment, the gunshot wound, or the *the* wound you say was made by a bullet, was sufficient to produce death?

A. It was.

69 Q. State to the jury whether or not the gunshot wound was necessarily mortal?

A. It was.

Q. Doctor, suppose that person was killed by either of those modes, or both, and then shortly after the killing the body was cut in two as you have stated and the viscera taken from it, and the blood ran out, I presume, and then those pieces all thrown in the water so that it would be under the water, taking into consideration that the water was cold, as it would be in that season of the year in the Missouri River, about how long, in your judgment—or rather, state whether or not within a week's time the body would necessarily be decomposed and blackened?

A. Under those circumstances, kept under the water, it would not.

Q. Then, if one of these pieces were drawn from the water it would?

Q. The skin had a white appearance. Would that necessarily indicate that it had been deposited there only a few hours?

A. I don't understand exactly your question.

Q. If, when this body was drawn from the river, it had a white appearance, a pale white appearance, it was not black yet, would that necessarily indicate it had been there just a few hours?

A. No, sir; it would not.

Q. It might have been there how long?

A. Could not tell how long it lay in the water exactly; it had a white appearance, but the skin had a wrinkled appearance, which water makes upon the skin after it has been in a number of hours.

Q. How long could it have been in there?

A. Of course I could not tell; several days, at least.

Q. You would think several days?

A Yes, sir.

Cross-examination:

Questions by Mr. WEBB:

Q. Counsel asked you, doctor, about the appearance of the bones that had been sawed, with respect to the character of the instrument by which they had been severed, both as to the spine and the ribs, and your answer was that they had the appearance of having been cut by a fine or narrow saw, a stiff backed saw. I want to know what you did say?

A. I didn't say a narrow, but I said a fine instrument with keen teeth.

Q. Go on, and tell?

A. With an instrument that had very fine teeth and that would cut very keenly. I mean a sharp saw with fine teeth.

Q. Was the question put to you about a saw having a stiff back? That is what I didn't hear, and I would like to have you state?

A. Well, the line of the saw was so straight that I concluded that it was not cut with a limber saw, but a stiff saw; there are stiff saws and limber saws; but the marks of the lines were so straight as to lead us to believe they were cut with a stiff saw.

Q. I will ask you about the appearance of the eyes of that body? I did not hear your statement as to the appearance of the eyes?

A. I said that upon the right eye, or over the right eye, there was a little contusion and a clot of blood and on the right side of the eye.

Q. Did you offer any opinion as to what instrument had been used in producing that?

A. The jaw was broken, as I forgot to state, immediately below, and in tracing the ball through the head we traced it down back of the orbit there and we thought that probably that was which caused the clot of blood—which it may have come from—from that source, but there was a little contusion just above the eye which may have caused it.

Q. The question I asked you, doctor, and which I desired an answer, is you are prepared to give it, is, what instrument was used to probably cause the effect of that contusion there?

A. Well, it may be done with any instrument, slight instrument, or a fall against anything; so far as we saw the appearance of it on the skin

the clot of blood around the eye and around the orbit occurred as I told you, and that came from the bullet passing through the head near that point, or passing near that point.

Q. Now, doctor, you stated that that crush, was the language of counsel for the Government, inflicted upon the back of the head, was sufficient to produce instant death?

70 A. Yes, sir, I said it was a mortal wound; that death would result.

Q. I did not mean to say instant death. That it was sufficient to produce death; that was the language. Now, I will ask you if, in order to produce that injury upon the back of the head, the blow would have been sufficient to knock a person down, if standing?

A. Yes, sir.

Q. You say that the jaw was broken?

A. The jaw was broken; yes, sir.

Q. And the injury was to the right eye?

A. Yes, sir.

Q. Now, a person struck in the back of the head with something sufficient to produce death, and given with momentum to make a body fall instantly, would not such falling body upon a hard floor, or hard cellar, or hard ground, or pavement, produce the fracture of the head and the injury over the eye?

A. The injury over the eye could have been produced that way. It would have had to fall upon a hard rock to have produced the clot of blood, and the fracture was at the back of the eye.

Q. Suppose the blow was inflicted from the front with some instrument which created that injury or wound there, and at the same time the knock caused the person to fall backward, and then it should strike upon something, would not both wounds be inflicted in the same way?

Q. It is simply a question whether a person struck from the rear or in the face and knocked down, would not the one blow cause—the body being struck, if struck from the back—produce the injuries over the eye and to the head, and if struck in the face should strike heavily upon some rock or stone cause the injury to the back of the head?

A. I don't think they occurred from the same blow.

Q. Why not?

A. Because the direct stroke and the counterstroke would not be so great in both places.

Q. Now, doctor, I want to know if that injury received in the back of the head was sufficient to produce death, and caused the body when it received it, being in an upright position, to fall down, whether or not there would be any life to be extinguished by a shot afterwards?

A. With such a fracture as I found I have known persons to live a day or two outside of the fracture made by the bullet.

Q. Well, that injury that you first described as being in the neck?

A. While being sufficient to produce death it would not produce instant death.

Q. In regard to the gunshot wound, would not that have produced instant death?

A. Yes, sir; the gunshot wound was sufficient to produce instant death.

Q. Then you would argue from these facts that it is probable, and as a matter reasonable to be inferred, that the injury, if from some blow, was inflicted afterwards?

A. That would be a conclusion; yes, sir.

Q. Counsel asked you if you found the point of exit of that ball. I will ask you if you probed the wound to ascertain the depth of the wound?

A. No, sir; we didn't probe it; we took the skull off the top of the head, took out the brains and followed the ball track as well as we could. It went crushing through the base of the brain, ploughing the floor of the brain, as I say, running towards the right eye, from the left side and back of the eye, and there this fracture is I speak of. In front on the inside it was so that we could not trace it any further; it didn't appear upon the skin upon that side; the jaw bone was broken back there, and finding these wounds upon the right side, we traced the shots down along the neck; we opened the neck, thinking perhaps we might follow the bullet by the clots. I think in all probability they were made by the bullet; we followed down to the chest, the chest being open, and there we abandoned it, the body being mutilated.

Q. When was that post-mortem examination had?

A. That was upon the 29th of March.

Q. That was the day the body was found in the river?

A. No, sir; it was the day after. Looking at my notes to-day I found that the 29th was the date; my recollection is that we didn't make post-mortem until the day after it was found.

Q. That would be Saturday, would it not?

71 A. Yes, sir; I have the notes the 29th; don't know whether it would be Saturday or not.

Redirect examination:

Question by Mr. ADY:

Q. Doctor, you may look at that and say whether that would be the proper instrument to do that sawing with?

A. Yes, sir; I say that it could be done with such a saw; that sawing could be done with such a saw.

Recross examination:

Questions by Mr. WEBB:

Q. You say that the severance of the bones could be done by this saw? Let me ask you if it could not be done by a larger or different saw, by a butcher saw?

A. I don't know exactly what a butcher saw is. Hasn't a butcher saw coarser teeth than that?

Q. Could it not be done with any fine-toothed saw?

A. Yes, sir; as I said before.

Doctor GODDARD, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. You name is C. C. Goddard?

A. Yes, sir.

Q. You are a practicing physician?

A. Yes, sir.

Q. Your residence is Leavenworth?

A. Yes, sir.

Q. How long have you lived here and practiced?

A. From the first time I came; I have lived here nearly all my life, but been here this time about five years.

Q. Are you a graduate of some of the modern schools of surgery?

A. Yes, sir.

Question. What?

A. Bel'vue Hospital College, New York City.

Q. Were you present at the post-mortem examination of Mrs. Mettman?

A. Yes, sir.

Q. You may describe to the jury how that body was dismembered.

A. It was cut across the middle, horizontally below the chest, and then further down it was divided, leaving one leg and hip on that side, and the right leg and backbone up to the sawed portion and the right hip were missing; the left leg and side of the hip up to the vertebre, where it joined the vertebre, and the trunk, head, shoulders, and trunk, as far as the bottom of the sternum, were there.

Q. Were the entrails there?

A. No, sir.

Q. Did you notice whether the lungs were there?

A. The lungs were there; the chest cavity was unopened by the cutting; the diaphram, the large muscle that separates the thoracic cavity from the abdomen, was intact, and had not been opened; the heart and lungs were in the chest.

Q. What day was this day?

A. It was on the 29th day of March; I saw her first on the 28th, at the undertakers.

Q. What was the appearance of the face when you first saw her?

A. It was, rather it had the appearance of having been under water; it was rather grimy, as I would call it; the skin was firm and all the tissues were solid, and had a bullet hole right back of the left eye; that was when I saw her at the undertakers; afterwards I was endeavoring to see if I could find the bullet, and afterwards Doctor Thomas and I went to the Mettmann house and made an autopsy and endeavored to find the bullet.

Q. What was the appearance of the skin as to being discolored on the face when you first saw her?

A. It was very nearly natural.

Q. Considering the fact that the body had been dismembered shortly after death, the blood and the entrails taken from it in the manner that naturally would result from that sort of cutting up, and then that body had been thrown in the river and remained under water, what space of time, in your judgment, would it have been in the water—more than a few hours, or what?

A. My judgment is that the body had been in the water not over two days. My judgment would be that that body had not been in the water over two days.

72 Q. You could not fix any definite time, of course?

A. No, sir; that is merely judging from examination.

Q. It would be considerably more decomposed than when the water was cold and the entrails taken from it and all the gases out of the body?

A. Yes, sir.

Q. Now, did you observe how the bones were severed; the bones of the body where it was cut in two? Did you notice?

A. Yes, sir.

Q. In your judgment, what were they severed with?

A. A saw.

Q. I will get you to look at this package. What is this, doctor?

A. That is the vertebræ that we took off the sawed portion that was sawed in two; we separated it; that was sawed from the vertebræ; that is what we took from the body; I took it from the body.

Q. Doctor, you may state whether or not, in your judgment, that would be an apt instrument for cutting those bones as they were cut.

A. It might have done it.

Q. It was done with a fine saw, was it?

A. Yes, sir.

Mr. ADY. We offer that bone in evidence.

Cross-examination:

Questions by Mr. WEBB:

Q. You were asked if the bones of the vertegre and the ribs, I suppose whatever was severed, in your judgment could have been cut or severed with this instrument, or this, or one like it, and you expressed the opinion that it could?

A. I said it might have been.

Q. Might not the severance have been made by a saw of a different pattern, make, and size, by any instrument—by any saw having fine teeth and being stiff, whether made so by a back like that, or simply a broad blade?

A. Yes, sir; it could.

Q. I will ask you if you are familiar with a butcher's saw?

A. Yes, sir.

Q. Might not the severance of the bones have been made with a butcher's saw?

A. Yes, sir.

Q. It might have been done and left the same appearance?

A. Yes, sir.

Q. Now these pieces of bones or bony substances submitted to you, these which you say is a part of the vertebræ and those I submitted as the vertebræ, that there is a seperation of the ligaments?

A. I don't know about the other pieces; those other were points of the ribs.

Q. I understood you to say, doctor, that you saw the body that was represented to you as Mrs. Mettamn's body on Friday, the 28th day of March?

A. Yes, sir.

Q. What hour of the day did you first see it?

A. It was just before or just after noon.

Q. Where was it when you first saw it?

A. At Carthouse's undertaking rooms.

Q. In this city?

A. Yes, sir.

Q. It then had been brought from the river down to the undertakers?

A. Yes, sir. I saw it in a box.

Q. Did you make an examination of the body at all at that time, or such parts of the body as were there?

A. About the time I found the bullet hole; that is about all the examination I made, except to find that one limb was absent and portions of the body.

Q. Now, in your opinion, what do you say was the length of time that that body had been in the water?

A. My opinion was that it had been in the water not over 48 hours.

Q. That, you say, was just before noon or the afternoon on Friday?

A. Yes, sir.

Q. Then, on the next day, Saturday, yourself and Doctor Thomas, I guess it was, made the post-mortem examination?

A. Yes, sir.

Redirect examination:

Questions by Mr. ADY:

Q. I forgot to ask you what wounds did you find in the back of the head of that person?

73 A. Externally we didn't find any.

Q. What wounds did you find?

A. We found back of the head, when we removed the skull, we found a large blood clot under the skin which connected with the fracture of the skull extending across back near the upper end of the costal bone; it was a ragged looking fracture running back in direction like that was the back of the head [indicating] and that was the top of it, and this part caved in [indicating], the upper part leaving these sharp fragments sticking up and this other fracture sticking down; that was what we found. When we went inside we found all the bones of the skull fractured; I do not think there were any but what were torn up.

Q. Did you find a gunshot wound?

A. Yes, sir; two inches back of the left eye, extending backward, inward, and towards the right side, upwards, I should say.

Q. In your opinion, what was the gunshot wound inflicted with?

A. From other wounds I have seen I judge it to be a .44 or .45 calibre pistol ball.

Q. And the other wounds; the crushing of the skull?

A. In my opinion it was done with an instrument something like a big shot or a sand bag; something with a soft surface.

Q. You may state whether the wound which crushed the skull was a necessarily mortal wound, if inflicted alone.

A. It is a hard question to answer. They sometimes get well with very big *a*ractures.

Q. Ordinarily, was it a mortal wound, in your opinion?

A. I should say yes, sir.

Q. The gunshot wound—state whether it was necessarily mortal.

A. Yes, sir.

Q. It would produce death about how soon?

A. About as quick as they got it. It would separate the spinal cord from the brain. Could not have lived an instant.

J. W. POWELL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is J. W. Powell?
A. Yes, sir.
Q. You reside in Leavenworth?
A. Yes, sir.
Q. How long have you resided here?
A. Lived in Leavenworth 21 years.
Q. What is your occupation?
A. On the police force.
Q. Do you remember the occasion of the disappearance of Mrs. Mettman and the discovery of her body in the river?
A. Yes, sir.
Q. Were you there when the body was taken out?
A. Yes, sir.
Q. How many pieces?
A. Two pieces.
Q. The trunk and head in one parcel and the leg and bowels in another, and you found another package, did you?
A. Yes, sir.
Q. What was that?
A. White flannel skirt, a dress skirt, and white skirt.
Q. The leg you found, what was that enclosed in?
A. In a gunny sack.
Q. What kind of a sack was that? Where can you find such sacks?
A. They call them here Government sacks. You see them where they have bran or grain for the Government; grain or bran sacks that will hold two hundred pounds of shelled grain.
Q. Do you see them around the groceries?
A. Yes, sir.
Q. Nothing singular about the sack, was it?
A. No, sir; not that I know of.
Q. I suppose you have seen a great many of them?
A. Yes, sir.
Q. When that body was taken from the river, what was done with it?
A. It was taken, I think, to the house of John Mettman.
Q. Did you know Mrs. Mettman in her lifetime?
A. I had seen her.
Q. This body was taken to that house?
A. Yes, sir.
Q. After that, what was done with it?
A. I don't know; think it was buried, and that some doctors held a post mortem—Doctor s Thomas and Goddard; after that I don't know.
Q. Do you rememb er discovering what was supposed to be the marks of blood and some other articles out upon the reservation the following Sunday?

74 A. Yes, sir.
Q. Were you out there?
A. Yes, sir.
Q. Whom did you go there with?

A. Mr. Atwood, Sutton and Murphy, and myself. We went together and Jim. Barry.

Q. What did you find when you got there?

A. We found the teeth and the scarf, candy, and peanuts, and some twine, common wrapping twine.

Q. Had you seen some twine down where the body was found?

A. Yes, sir.

Q. How did these pieces correspond?

A. Exactly like it. We went out there and there is a gully that comes up from the north, and right in the head of that gully, right at the edge of it, found a splatch of blood.

Q. Describe to the jury the appearance of that spot of blood.

Q. Quite a spot of coagulated blood; looked like some one had been tramping around; one piece of twine that I gave to Atwood looked like it was grasped with a bloody hand; could see imprints of fingers.

Q. How did that correspond with the twine taken from the river?

A. Just like it exactly, and found a butcher knife twelve to fifteen inches. It was buried in the ground and the back of the knife was sticking up. From fifteen to twenty feet we found the teeth, and six or eight feet one side we found a handkerchief, and there was a spot of blood on the grass and candy and peanuts, and there was evidence of a struggle around there. You could see the tracts. I believe that is all we found.

Q. That muffler; was it found?

A. Yes, sir.

Q. It was about ten feet from where the teeth were found and a little northwest. That was about 115 paces north of Broadway and 95 paces east.

Q. How far were the teeth lying from the blood spot nearest to it?

A. Three or four feet.

Q. Describe to the jury as well as you can the appearances of that spot of blood.

A. You could see clotted blood that had laid there in the sun, and there was a place not quite as large as the crown of my hat. We took it up. Sutton had a man there who took it up. The place is still up there. You can see where the sod was taken up.

Q. Was that blood, would you say?

A. Yes, sir; I think it was blood.

Q. This spot where the blood was and the handkerchief and peanuts, etc.; on what ground was that?

A. On the Government reservation.

Q. The Government reservation? What do you mean by that?

A. The reservation north of the city.

Q. The Fort Leavenworth military reservation?

A. Yes, sir.

Q. How long have you known that reservation?

A. 31 years.

Q. And you say that was about how many rods out into the reservation from the line of Leavenworth?

A. One hundred and fifteen paces north of the south Government fence at the head of Broadway, and ninety-five paces east.

Q. It was on that part of the grounds enclosed with a fence?

A. Yes, sir.

Q. Have you been over at that point and looked over towards the city of Leavenworth to see whether you could see the houses over there?

A. You can see the houses.

Q. What is the appearance of the surface of the ground from where this spot of blood was?

A. The two spots of blood ran off in that direction [indicating].

Q. How does the ground slope?

A. It slopes up quite a good deal.

Q. When you start down towards the bridge how is the ground?

A. It is down hill that way. There is a gully that runs into the creek from the east and west.

Q. Suppose a person started from the head of the gully, where you say the butcher knife was found, and following that gutter down to the creek, what creek do you come to?

A. Two-Mile Creek.

Q. And then following the creek down to where this body was drawn from the river, I want to ask you: Have you been over that ground and are you familiar with it?

A. Yes, sir.

Q. Following them both, suppose a person should walk down from where you found the spot of blood down the gully to Two-Mile
75 Creek and then down Two-Mile Creek to where you found the body, what would be the opportunities of a person being seen from the city or fort grounds?

A. Not apt to be seen. It is an out-of-the-way place. You hardly ever see anybody in that Government field and that hollow which runs into Two-Mile Creek, and after you leave the fort road there is nobody you are apt to see until you get down to the wagon-road bridge, down to the bridge going over the Missouri River.

Q. Suppose a person were going along that gully and the creek; what would be the chances, what would be the opportunities, of a person to conceal themselves or their burden if they were carrying a part of a dead body down there?

A. There is no place but what a person could conceal themselves. It is all full of gullies and washouts.

Q. Do you know what was done with these teeth and this muffler and the other articles picked up there?

A. They were given to Mr. Atwood.

T. Did you see that muffler afterwards exhibited to Mary Rautzahn?

A. I did.

Q. Was it the same muffler that was picked up there?

A. Yes, sir.

Q. You may describe to the jury the color of the muffler.

A. It was a merino muffler; red and green and yellow colors mixed up with a figure around in that shape [indicating] and runs around here [indicating]. I suppose it at one time had been a square muffler; looked as though it had been torn in two. I had one once several years ago, and it was just such a figure. It was square and about three-quarters of a yard long, and there was two wraps of twine around it. It was tied in two knots and the twine in 'nots.

Q. The twine; you say that was tied around that, I believe you said?
A. There was some pieces of twine picked up over by the gully.
Q. One, I believe you said, had the appearance of a bloody mark?
A. Yes, sir; I believe Mr. Atwood has that.
Q. Did you see the twine with which the weight was tied around Mrs. Mettman's neck?
A. I did.
Q. How did that correspond?
A. Exactly alike.

Cross-examination:

Questions by Mr. WEBB:

Q. Mr. Powell, about that gunny sack in which part of the body was found? I understood you to say that it was what was called a Government sack?
A. That is what they usually call them here.
Q. Such as Government grain, oats, etc., are purchased in and kept for the use of Government horses?
A. Yes, sir.
Q. Now, you say you were on that reservation on Sunday that Mr. Atwood, Sutton, and Barry were there?
A. Yes, sir.
Q. There were a good many people there, were there not?
A. Yes, sir; there were one man and a boy when we got there.
Q. Were you there before this time you went in company with Atwood, or rather with Barry before Atwood went?
A. I went with Atwood, Barry, Sutton, and Murphy.
Q. What day of the week was it?
A. On Sunday.
Q. Where did you start from?
A. Started from police headquarters on the corner of Shawnee and Fifth.
Q. What time of the day was it?
A. Probably a little before twelve or a little afterwards. It was about the noon hour; I guess probably half past eleven when we left the office.
Q. Are you not mistaken, Mr. Powell, in regard to the day being Sunday? Was it not Monday?
A. No, sir; Sunday.
Q. Had you learned in anyway that Mr. Barry had been there before you went with Atwood?
A. Yes, sir; he came down for Sutton and notified him and me, and Mr. Atwood, Mr. Sutton, and Murphy went up there.
Q. Now, you gave in answer to counsel for the Government some distances, and I didn't write them down. I want to ask that over
76 again. Let me ask you a preliminary question, whether you were there last November on the ground with Murphy, Mr. De Bost, some other gentleman, I don't know who it was, and myself?
A. No, sir; I was not.
Q. Then I will have to ask you your standpoint from which you gave that testimony. From your meagre knowledge of that reservation and its south boundaries, let me ask you, first, concerning the macadamized road which goes to the fort. You are familiar with that, of course?

A. Yes, sir.

Q. What street runs out to that military road. What is the number of the street?

A. Seventh street.

Q. Now, what is the course of that military road from the head of Seventh street?

A. It is a little west of north.

Q. From the northwest corner of Seventh street it intersects the other road? Seventh street runs north and south?

A. Yes, sir.

Q. And at the north end of Seventh street the continued highway or road is the military road that leads to the fort, and that runs a little west of north from Seventh street to the fort?

A. No, not from Seventh street to the fort.

Q. Well, as far as we care to inquire?

A. Yes, sir.

Q. Now, after leaving the head of Seventh street and after you have made that angle, is there not a fence that runs westerly along the south line or of across that reservation?

A. No, sir; there is no fence, except from the head of Broadway there is a fence which runs west.

Q. I will ask you that if that runs west then the other must run south?

A. There is a fence that runs along the Government road.

Q. Is that fence on the line of the reservation?

A. No, sir; it is not.

Q. There is a large open space between that fence and the buildings on Metropolitan avenue east?

A. Yes, sir; there is a three-cornered piece on the west side of the military road.

Q. That three-cornered piece is a part of the Government reservation?

A. Yes, sir.

Q. Now, when you were asked to state whereabouts with reference to the lines of that reservation was, the particular locality where the teeth and muffler were found, you gave a certain number of yards or feet?

A. Paces; I said I stepped it.

Q. Now, that was from the line of Metropolitan avenue, was it not?

A. Yes, sir. No; no, sir; it was inside of the fence; right at the head of Broadway there is a fence that runs directly north; I stepped down to that fence opposite to the head of the gully where the muffler was found.

Q. I understand, now, your point. Now, at that point where you commenced stepping there is a gate, is there not?

A. Yes, sir.

Q. And the fence runs west, you say?

A. One fence runs north and the other west.

Q. Which is north?

A. The one across the Government field.

Q. Across the Government field? I still don't understand you.

COURT. You have consumed about two hours about this fence.

Q. For the purpose of aiding this witness, let me take this map. Let me ask you in regard to which way it runs. On one side of that piece of

land you speak of is Metropolitan avenue and on the other is what is called simply the Government road or Logan avenue.

A. I never heard it called Logan avenue.

Q. From the fence that runs along there [indicating] that piece of land, I want you to state the distance from that fence right directly to the spot where you say the teeth was found? What is the distance from the fence?

A. Right from the head of Broadway it is 115 paces north or 95 paces east.

Q. Now over to the east?

A. Right opposite the head of the hollow I stepped from where the teeth were found, I stepped right east to this fence and it is ninety-five paces, and then I stepped along the fence that runs south to the head of Broadway or Metropolitan avenue, and that is one hundred and fifteen paces.

77 Q. Mr. Powell, I am asking you how far it was from the fence itself?

A. The fence is about 100 paces; that is the nearest fence I saw.

Q. You fixed a place where the teeth were found. How far was it from that particular spot to the nearest fence?

A. About one hundred feet; from eighty to one hundred feet.

Q. Now, I ask you the distance across and a little south of east to the nearest fence, in a southeasterly course?

A. 115 paces.

Q. Counsel asked you in regard to the facilities for a person going without discovery from the place where that muffler and teeth were found as you described it, down that little ravine to Twomile Creek, and thence to the river. What I desire to ask you is whether you could start from that point and go where the gully empties into Twomile Creek and thence to the river without crossing fences?

A. Yes, sir; you could.

Q. And keep in the creek all the time; that is, along the bank of the creek or edge of it?

A. You could take down the railroad track?

Q. I don't know where the railroad track is. Could you follow down that all the way without crossing any fence?

A. Yes, sir.

Q. Does not that creek run under that macadamized road? Is not there a bridge across it?

A. Yes, sir.

Q. Is not there a fence upon either side?

A. Yes, sir; but you could go under the railroad track.

Q. How far is the railroad track from the bridge?

A. It runs right under the bridge.

Q. In order, then, to follow that down, you would have to follow the railroad track?

A. You would under the bridge; after you got from under the bridge you could leave the railroad track.

Q. Now, in regard to that twine which you say was attached to that muffler; I believe you said there was twine attached to the muffler?

A. Yes, sir.

Q. You also stated that there was twine attached to some rocks tied around the neck of the body?

A. Yes, sir.

Q. And that your judgment was that they corresponded with the same kind of material?

A. Yes, sir; same size of twine.

Q. Is not that twine such as is used in connection with gunny sacks?

A. It is a little larger kind of twine that you use for sewing up sacks.

Q. Might it not be used for such purposes?

A. Yes, sir; but it is not usual to use that twine.

Q. Was the twine old or new?

A. It was new. In both places it was damaged some, and that which was found at the head of the gully was bloody.

JOHN METTMAN, a witness on behalf of the plaintiff, being recalled, testified as follows:

Question by Mr. ADY:

Q. Mr. Mettman, did your wife wear false teeth?

A. Yes, sir.

Q. Which plate; upper or lower?

A. Upper.

W. D. FLEMING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is W. D. Fleming?

A. Yes, sir.

Q. Reside in the city?

A. Yes, sir?

Q. How long have you lived here?

A. Since 1875.

Q. What is your occupation?

A. Carpenter.

Q. Where do you reside in the city?

A. Northwest part.

Q. How far from the reservation?

A. Two and one-half blocks.

Q. How far from where Broadway would intersect the line of the reservation if it was extended on it?

A. About 2½ blocks.

Q. In which direction from that point from Broadway where Broadway comes up to the reservation?

A. Southwest; I live on the corner of Dacota street and Broadway.

Q. Do you remember the disappearance of Mrs. Mettman?

A. I have heard of it; I have seen her in her lifetime; I remember it.

Q. What date was it?

A. 23d of March, 1890.

78 Q. Where were you that evening?

A. I was at home.

Q. During that evening, the forepart of that evening, did you hear any gunshots in the direction of the reservation?

A. Yes, sir; about half past nine o'clock I heard two shots; there was two shots.

Q. Where did they seem to be to you?

A. They seemed to be from some place up between the city line and the head of this ravine where this deed was committed.

Q. Did you afterwards see the spot where it was said certain things were picked up?

A. I saw the spot; didn't see the blood; I didn't see the corpse or anything there but the spot where they said they found the teeth.

Q. At the head of the ravine?

A. Yes, sir.

Q. Is that the locality that you refer to that you heard the sound in?

A. Yes, sir; it was in that direction.

Mr. WEBB. Now, don't testify yourself.

Q. What time was it?

A. Half past nine o'clock, I thought.

Cross-examination:

Questions by Mr. WEBB:

Q. Mr. Fleming, I wish, if you will—it will take you but an instant—to draw a line from your house up to the Government reservation; it will take but a minute; you say you live on what streets?

A. Eighth and Dacota streets.

(Counsel gives witness paper to draw line.)

A. There is a sketch of it.

Q. Give me your diagram, if you please?

A. Here [indicating] is the end of Broadway, and there [indicating] is the road that runs off to Seventh street, and here [indicating] is the head of the ravine.

Q. I don't think I understand that. I first asked you, "Is that what represents your house?"

A. Yes, sir.

Q. What street do you call that?

A. Eighth.

Q. That runs north and south?

A. Yes, sir.

Q. You say you reside on the corner of Eighth street and Dacota avenue?

A. Yes, sir; on the corner.

Q. Dacota street runs east and west?

A. Yes, sir; east and west.

Q. South of your house?

A. Yes, sir; south of my house.

Q. Eighth runs north and southeast of your house?

A. No, sir; it runs west.

Q. Now, from your house in going north on Eighth street you first go to Pawnee?

A. Yes, sir.

Q. Then you go, that is, another block, and then you go another block, and then come to Cheyenne street, and then another block, and then strike Metropolitan avenue?

Yes, sir; well, it is called Sioux street.

Q. You reach, then, what is called Metropolitan avenue?

A. Yes, sir.

Q. Then how far are you at Metropolitan avenue from the line of the Government reservation?

A. It is right there.

Q. Is there a gate directly across Metropolitan avenue that leads into the reservation?

A. Yes, sir; there was.

Q. Now, at that gate; that gate is in the angle of the fence; I believe it is right in the corner of the field; one fence runs west and the other runs northeast?

A. Yes, sir.

Q. What is the distance from your house along Eighth street, the entire block from Dacota street to Pawnee, and from Pawnee to Cheyenne, and from Cheyenne to Metropolitan avenue, and across from that corner to the gate; what is that distance?

A. Well, these lots are 44 feet on the block I live on; the distance is about——

Q. How many feet to the block, including the street?

A. It is about three hundred and forty yards from my house down to the Government reservation.

Q. Is that to the gate?

A. Not to the gate——

79 Q. I asked you how far it was from Eighth street to that gate?

A. It is in the neighborhood of three hundred and forty yards or four hundred.

Q. Now, I will ask you if Eighth street is built up on both sides between Dacota and Pawnee?

A. Yes, sir; there is some houses.

Q. How is it between Pawnee and Cheyenne; built up on both sides?

A. There is one house; Wilson's house.

Q. Is there any house between Cheyenne and Metropolitan avenue; on Eighth street, I mean?

A. Yes, sir.

Q. Well, now, were you indoors or out?

A. In the house.

Q. Have you been to the place it is said the teeth and muffler were found?

A. Yes, sir.

Q. What is the distance from that gate to your place?

A. I judge it is about 350 or 400 yards.

Q. Then, if it is 400 yards it would make nine hundred yards to that place?

A. I should judge just about; yes, sir.

Q. Is there not a block of land there known as block?

A. Yes, sir.

Q. Is it not covered with timber?

A. Yes, sir.

Q. Is it not between the point where the teeth were found and your place of residence?

A. Yes, sir.

Q. I believe you said you were indoors, and about half past nine o'clock, and the doors and windows closed at that season of the year, and you heard two shots?

A. Yes, sir.

Q. And you looked to the point from where the gun was discharged; how and in what way did you fix the distance?

A. That is just from my own opinion; it sounded in that direction to me.

Q. That is part of the military reservation, and is it not a most usual thing to hear gunshots over there on that reservation?

A. Yes, sir; it is a very common thing.

Q. I want to know another thing: how you fixed this to be the 3d of March; your attention was not called to it that night, was it?

A. No, sir; it was not.

Q. Nor the next day, nor the next, nor until the body was found, nor until search was made to see how she came to her death; not until then?

A. No, sir.

Q. And then when the body was found you fixed on the 23d of March?

A. Yes, sir; I knew where I was.

Redirect examination:

Q. How did you happen to remember it?

A. I was at home, and of course I remembered where I had been, as any person else would.

Q. Judge Webb figured around the corners of the blocks and made the distance nine hundred yards, and I do not suppose the sound blew around the corners. Taking across lots what would the distance be?

A. It would be some shorter; not a great deal; probably fifty or a hundred yards.

WILLIAM HOOPER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. What is your name?

A. W. W. Hooper.

Q. Where do you reside?

A. Leavenworth.

Q. And have resided here how long?

A. Going on seven years.

Q. Do you remember the occurrence of Mrs. Mettman's disappearance?

A. Yes, sir.

Q. Do you know the location of the military reservation?

A. Yes, sir.

Q. How near did you reside to that?

A. I didn't reside there; I resided in Leavenworth City.

Q. What was your occupation at that time?

A. I was night man at the Rock Island freight depot.

Q. Have you seen the place where the blood was supposed to have been found over there on the reservation, and the teeth and muffler, etc., were picked up?

80 A. No, sir; have not been to the place. I know the general locality.

Q. Where were you on Sunday night, March 23d, of last year?

A. I was at the Rock Island freight depot.

Q. Did you hear any shots fired on the reservation in the direction of the point named that evening?

A. Well, sir, to the best of my recollection I did.

Q. How many?

A. One shot.

Q. About what time in the evening was it?

A. It was between dark and ten o'clock; I could not state the exact hour.

Cross-examination:

Questions by Mr. WEBB:

Q. Mr. Hopper, you say to the best of your recollection you did. Are you certain as to the day of the week or night?

A. I am pretty certain; yes, sir.

Q. Why did you remember the particular day?

A. Well, sir, this was Sunday night; every other night in the week there was always some boys come to the depot and staid around, except Sunday nights, and they never came down on Sunday nights, and this night I was all alone and I had been reading, and I heard something outside, and I went out to the end of the depot and I heard a shot up in that direction; that is the reason I say it was Sunday night.

Q. Between what hours?

A. It was between dark and about ten o'clock, I should say; I generally laid down about ten or half past ten.

Q. Is it not a common thing to hear shots in that direction; Sunday and every day?

A. No, sir.

Q. Whereabouts is the Rock Island depot with reference to that gate opening upon the reservation?

A. I should judge the Rock Island from that gate where it opens is about two blocks and a half.

Q. What direction?

A. Kinder southwest; west and a little south.

Q. Let me ask you, Mr. Hopper, if you had any conversation this morning with me and Mr. Dill, or with me in his presence, about you hearing shots?

A. I think I said something to you about it.

Q. Didn't you tell me that you desired to stay in the room?

A. Yes, sir.

Q. And that they wanted you for the purpose of having your testimony about some pistol shots, and you were not certain whether it was Sunday or Monday?

A. I said I was not certain for sure whether it was Saturday or Sunday, but I am sure now that it was Sunday night.

Q. Then you are more certain than you were this morning?

A. I just told you my reasons for being that way, for every other night in the week the boys came down, excepting Sunday night.

Q. You can not fix the hour of the night?
A. Between dusk and ten o'clock.
Q. Just one shot?
A. Yes, sir.
Q. Were you indoors or out?
A. I had been setting out.
Q. I ask you whether you were indoors or out.
A. I was out of doors.

N. G. SINGLETON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. Your name is N. G. Singleton?
A. Yes, sir.
Q. Where do you reside?
A. Kansas City.
Q. Do you know the defendant, C. A. Benson?
A. Yes, sir.
Q. How long have you known him?
A. Ever since March, 1889, I believe, or May.
Q. What is your occupation?
A. Machinist.
Q. What business were you in during the year 1890?
A. In the hay press business.
Q. How hay press business?
A. Were manufacturing them.
Q. What position did you occupy in the firm?
A. As foreman.
81 Q. Did Benson work for that company?
A. Yes, sir.
Q. From what time to what time?
A. He commenced in May, 1889, and worked until March 29th, 1890.
Q. In May, 1889, and worked until what time?
A. Until March 29th, 1890.
Q. What were your duties as foreman with reference to the men employed in the shop?
A. To see that the work was done right and keep time.
Q. What was your way of keeping time?
A. Every night each man made out his time card.
Q. What are those? [Showing witness cards.]
A. Those are Benson's time cards.
Q. All of them—I mean is that all the time cards he made out?
A. He made one every day.
Q. In whose handwriting is this writing?
A. Benson's.
Q. All of it, on each card?
A. All except that. That is my own signature.
Q. What signature do you mean?
A. This right here [indicating]. It is S. M. on one of the cards.
Mr. ADY [reads time cards]. These are the dates of the time cards: March 22d; what is that, '90 or '91?

A. It is '90; March 22d, 1890.
Q. And March 8th, 1890, and July 29th, 1889.
Mr. WEBB. Are you testifying?
The COURT. That is all proper.
Mr. ADY. I was identifying these so as I can have them marked.
Q. Do you remember, Mr. Singleton, one of those cards, I believe, according to the appearance of the card, was dated the 22d of March, was it not?
A. One of those cards; I don't remember.
Q. Was Benson at your place on the 22d day of March?
A. I don't remember the time; the book here shows.
Q. How about that?
A. That is the date on there; I can not say; there might have been a mistake in the date. Yes, sir; he was there on the 22d.
Q. On the 22d he was there?
A. Yes, sir.
Q. Do you know what time of the week the 23d was?
A. It was on Sunday.
Q. On the 24th; was Benson there on the 24th?
A. No, sir; that was Monday.
Q. Was he at your place at all on that day so far as you remember?
A. I didn't see him.
Q. What notification did you have that he would not be there on the 24th?
A. He told me he was sick.
Q. I mean before; what notification did he give you that he would not be there?
A. He didn't give me any.
Q. When did he next appear after Saturday evening?
A. After the same Saturday?
Q. After Saturday evening, the 22d. When did he next appear?
A. Tuesday morning.
Q. What time?
A. I don't remember.
Q. If Saturday was the 22d—you say he was there Tuesday morning—that was the 25th, was it?
A. That is right.
Q. Did he work all day the 25th?
The COURT. Do your books show that he was there the 25th?
A. Yes, sir.
Q. Was he there on the 26th?
A. Yes, sir.
Q. All day?
A. Yes, sir; all day.
Q. The 27th?
A. Yes, sir.
Q. The 28th?
A. Yes, sir.
Q. The 29th?
A. On the 29th, six and one-half hours.

Q. What portion of the day were those six and one-half hours put in?
A. From seven o'clock until half past two.
Q. Did he work for your firm any after that?
A. No, sir.
Q. What was the occasion of his quitting, if you know?
A. I don't know.
Q. Did he say anything to you why he quit?
82 A. He asked if he could get a check about noon; that he would like to go at noon as we were talking of shutting down the shop and there would not be anything to do, and I told him he would have to wait until six o'clock; that the check would not be made out until then; he went away and said he would wait until six o'clock.
Q. Did he do so?
A. No, sir.
Q. When did he come for his pay?
A. Monday morning that was told him.
Q. Had your shop shut down?
A. No, sir; we didn't shut down.
Q. Had you given him any notice you wanted him to quit or anything of that kind?
A. No, sir.
Q. What was Benson's business? What did he do there?
A. He worked along side of the riveting gang.
Q. I didn't hear.
A. He worked on the riveting gang.
Q. That does not give us a very good idea?
A. It was just ordinary work; helping the riveters; he didn't have any certain job at all.
Q. Do you remember Mr. Benson borrowing any implement from you at any time?
A. Yes, sir.
Q. Shortly prior to his quitting?
A. Yes, sir; I remember of him asking me for a saw, and there was one hanging right over my tool box; when he asked me I told him he could have it, and I saw him take it off the nail.
Q. What saw was it?
A. This is it (pointing out saw.)
Q. Do you know when he returned it?
A. No, sir; do not.
Q. He did return it?
A. Yes, sir.
Q. Did Benson, when he finally came for his pay, did he give you any reason for quitting?
A. No, sir; I didn't see him at all.
Q. During that Monday you say he didn't appear, or from Saturday night until Tuesday morning, did you see anything of Benson around Kansas City?
A. From what time.
Q. From Saturday morning until Tuesday morning?
A. No, sir.

Cross-examination:

Questions by Mr. WEBB.

Q. You say that Benson, and this is the man, is it?

A. That is the man; yes, sir.

Q. You recognize him as the man who worked with you?

A. Yes, sir.

Q. You say that he worked from May, 1889, until the 29th of March, 1890?

A. Yes, sir.

Q. You produced a time card here which bears date the 22d of March—that was Saturday? Do you remember whether he worked all that week or not, from Monday until Saturday—the week ending the 22d?

A. My time book shows it.

Q. You have your time book with you, have you?

A. Yes, sir.

Q. Then, not asking you to look at all the days, I will ask you the general question whether from May, 1889, until the 22d of March, 1890, was he there working daily as much as the other employees?

A. Yes, sir.

Q. He worked by the day or by the week and received his check every Saturday night?

A. Yes, sir.

Q. How much was his weekly earnings, if counsel does not object?

A. Ten dollars and fifty cents every week.

Q. When he worked a full week?

A. Yes, sir.

Q. Now, you say that he was not there on Monday the 24th?

A. No, sir.

Q. That he was there to work Tuesday the 25th a full day?

A. Yes, sir.

Q. And Wednesday, the 26th?

A. Yes, sir.

Q. And Thursday, the 27th?

A. Yes, sir.

Q. And Friday, the 28th?

A. Yes, sir.

Q. All these days full?

A. Yes, sir.

Q. And how many hours on Saturday, the 29th?

A. Six and one-half.

Q. What hours were they?

A. From seven to half past two in the afternoon.

Q. Then he wanted his check. Told you he wanted his check
83 at noon because he wanted to go home, and not being able to get it, he said he would continue working, but quit at half past two?

A. Yes, sir.

Q. You didn't see him Monday, but you understand he got his check on Monday?

A. Yes, sir; that is what they told me.

Q. Now you said something about telling you he was sick Tuesday morning when he came to work?

A. Yes, sir.
Q. He told you he had been sick, when?
A. On Monday.
Q. He gave that as the reason he didn't work Monday?
A. Yes, sir.
Q. You said something also about some talk of your shutting down for a while?
A. Yes, sir.
Q. Was there not talk that you would shut down for a while?
A. We did think we would shut down that night, but by six o'clock we decided not to.
Q. What night was that?
A. That was the 29th.
Q. He knew that?
A. Yes, sir.
Q. You had not notified him you would shut down?
A. No, sir.
Q. He expected to be shut down with the other men, from conversations he had with you?
A. Yes, sir.
Q. Now, was any word sent to him, upon your knowledge, that he could come back to work again?
A. Not to my knowledge.
Q. You don't know whether he remained in Kansas City or not?
A. No, sir; never seen him since.
Q. You said he once asked you if you would loan him a saw; when was that?
A. Don't remember just when that was.
Q. You can not say whether it was March, 1890, or the month of February or January, or any time in the fall of 1889, can you?
A. I can say that it was close to that time, but can not say just how long.
Q. You can not say how long he kept it or what he used it for?
A. No, sir.
Q. Do you remember if he stated to you any reason or purpose for which he intended to use it?
A. No, sir; did not.
Q. Let me refresh your memory. Didn't he say he wanted to fix his bedstead?
A. No, sir.
Q. And you can not remember the time at all?
A. No, sir; I can not.

Redirect examination:

Questions by Mr. ADY.
Q. Mr. Singleton, you remember of reading or hearing of the Mettman murder?
A. Yes, sir.
Q. Now, according to your best recollection, how near was it to that time that this saw was borrowed?
A. I can not say.

Q. I say according to your best recollection was it near about that time?

A. Well, I do not have any idea; it was about something near that time; that is all I can say.

Re-cross examination.

Questions by Mr. WEBB.

Q. These time cards are in the name of C. Benson, are they not?

A. Yes, sir.

Mr. ADY. In connection with the eveidence already in the case I offer the saw, and the piece of back bone examined by the jurors?

HENRY SCHINDLER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Questions by Mr. ADY:

Q. State your name to the court and jury?

A. Henry Schindler.

Q. You reside where?

A. Leavenworth.

Q. How long?

A. Sixteen years.

Q. Are you familiar with what is known as the Fort Leavenworth military reservation?

A. Yes, sir.

Q. How long have you been familiar with it?

A. During all the time I have been here; I live at Ft. Leavenworth, and have been there every day.

Q. Have you been over all the ground mentioned in the testimony?

A. Yes, sir; I have.

84 Q. The north part?

A. Yes, sir.

Q. The Mettman house?

A. Yes, sir.

Q. The Foster house?

A. Yes, sir.

Q. Up and down Pawnee street, up and down Dacota avenue, or Dacota street?

A. Yes, sir.

Q. Up and down Broadway?

A. Yes, sir.

Q. You know the point of contact of Broadway with the reservation?

A. Yes, sir.

Q. Do you know the course of the ravine that has been mentioned?

A. Yes, sir.

Q. The Government roads?

A. Yes, sir.

Q. Twomile Creek?

A. Yes, sir.

Q. You know the point of confluence of Twomile Creek with the reservation?

A. Yes, sir.

Q. Where the body was said to have been found?

A. Yes, sir.

Q. Can you prepare a practically correct plat showing the ground plan of that country?

A. I can.

Q. You know the situation of the streets and blocks in Leavenworth?

A. Yes, sir.

Q. Did you prepare this plat? (Showing plat to witness.)

A. I did.

Q. What is that a representation of?

A. It represents the streets of the city running north and south and east and west up to the city limits, and the street known as Metropolitan avenue, which runs from the western bank of the Missouri River to the western limits of the military reservation, a strip 100 feet in width, donated or given by Congress for the city of Leavenworth.

Q. You may point out on that map to the jury the Foster house?

A. The Foster house is on Pawnee street near Sixth, between Fifth and Sixth streets.

Q. That street right in front of your pencil—what street is that?

A. Pawnee street.

Q. Which direction does it run?

A. East and west.

Q. Starting at the Foster house, indicate to the jury down the streets to Broadway?

A. From Pawnee street, from the Mettman and Foster houses, you first reach Sixth street and then Seventh; and in explanation I wish to state that blocks like it is here have not been made in exact proportion as they exist; the next is Seventh street, and then Broadway.

Q. Now, follow from where your pencil is, conducting you to the Mettman house.

A. You turn one block south to Dacota street; then you turn to the west, going up Dacota street until you reach the Mettman house, between Ninth and Tenth.

Q. Does that point indicate the Mettman house where the pencil now is?

A. Yes, sir.

Q. Return again to the Foster house and follow the line on that map, indicating to the jury the point of entrance into the reservation by the gate.

Mr. WEBB. Wait a moment. I don't know what you are going to have him give from the map. Your honor, the map shows the points of the land, but it does not show distances to the eye, and Mr. Schindler will undoubtedly say that, as he says it is not "laid out in proportion." The map we want is one that will show proportions to the eye; for instance, this one (indicating another map).

Mr. ADY. The trouble is, that don't show Twomile Creek.

COURT. I think, perhaps, if you could explain that, if it is possible, you have the houses marked on there; I want it for my own information.

Q. Return to the Foster house, and indicate on that plat the course of entering the reservation by the gate at the contact of Broadway.

A. You leave Foster's house, on Pawnee street, taking a course due west until you reach Broadway and Pawnee, and then you turn to the north, going to Cheyenne, and from there to Metropolitan avenue, and

there it is but a short distance until you enter the gate at the head of Broadway, or opposite Broadway, into the military reservation.

85 Q. Now, indicate the gate there.

A. Gate is right here.

Q. You may indicate to the jury the direction from the gate on that map—do you know where the spots of blood were?

A. Yes, sir.

Q. You may indicate that.

A. You take a northeast course after entering the gate in order to reach the head of the wash or gully, as it is known; taking this direction (indicating) to these red spots, indicating the points where the body was supposed to have been mutilated.

Mr. WEBB. That is not right at all.

A. This is the gully that runs down to Twomile Creek; this gully was formerly an old Government road, and it is the wash made over the old Government road; then it follows the road and runs into Twomile Creek, passing under a heavy iron and stone bridge, taking its course down there indicating) until it reaches the Missouri River.

Q. What indicates the Missouri River?

A. This line.

Q. Do you know the point about where the body was supposed to have been found?

A. Yes, sir; these three spots [indicating], a short distance—of course, I can not tell the number of feet—but a short distance from the confluence of Two Mile Creek and the Missouri River.

Q. What point indicates the point where the teeth and other things were supposed to have been found?

A. This point here [indicating]. This fence runs alongside of the road that connects Broadway with the main macadamized road to the fort, and this [indicating] piece of ground is also the United States reservation, lying outside adjacent to the fence between the fort road and the road which connects Broadway.

Q. Does that line [indicating] indicate the fence?

A. Yes, sir.

Q. And this [indicating] is on which ground?

A. On the military reservation.

Q. Do you know how long the fence has been there?

A. This [indicating] fence has been there for some years?

Q. Do you know by whom it was put there?

A. Built by the Government.

Cross-examination:

Questions by Mr. WEBB.

Q. There [indicating] you locate the Foster house?

A. There [indicating] is where Foster's house is.

Q. Is that Pawnee street?

A. That is Pawnee street.

Q. You say that leaving Foster's house you go west and cross Sixth street and then to Seventh, and then you stated that your map—that the map you had was not in proportion, but from Seventh to Broadway westerly I ask you if this one [indicating] is in proportion. Then the map

you have is not? It is true, is it not, that the block between Seventh and Broadway is wider than the others?

A. Yes, sir.

Q. Is it not three times as wide?

A. I would say it is twice.

Q. When you reach Broadway you say—when you reach Pawnee and Broadway you go north on Broadway to that point and then east?

A. Your map does not show correctly.

Q. I ask you if this does not show correctly that the head of Broadway is just there, and if prolonged would run square into the gate? (Showing map to witness made by defendant's counsel.)

A. I won't say the gate is at the head of Broadway?

Q. Broadway does cross this space? (Indicating.)

A. No, sir; only runs to Metropolitan avenue. It ends there.

Q. How wide is Metropolitan avenue?

A. About 100 feet?

Q. There is a space from Metropolitan avenue up to the gate?

A. Yes, sir.

Q. And Broadway if prolonged would run into the gate?

A. Yes, sir; I think it would.

Q. Your map does not show that?

A. No, sir.

86 Q. Your map, by reason of the narrowing of this block from Seventh to Broadway, shortens—brings it in the proportion it is—all that distance from this line [indicating] out to the fort road?

A. I want to say that I did not make the map according to a scale.

Q. I am not asking you that. Your map does not show proportions?

A. No, sir; it does not.

Q. Is not this map [indicating another map] more in proportion than your map?

A. I could not say. I want to say that all of this ground, this ground here [indicating], is the common and represents it the same as my own.

Q. When you reach this gate there is a fence that runs west?

A. Yes, sir.

Q. There is another fence runs northeasterly from there?

A. Yes, sir.

Q. Now, the open space between this fence [indicating] and Metropolitan avenue is part of the Government reservation?

A. Yes, sir; at this line [indicating] is what is known as Military or Fort road, or Grand avenue or Fort road.

Q. It is the one I refer to; it is the macadamized road?

A. Yes, sir.

Q. All this land over here [indicating] is the military reservation?

A. Yes, sir.

Q. The Missouri River would be somewhere east of the line of Sixth and Broadway. Now, what direction would it be from Foster's residence and then across that [indicating] street to the Mettman residence there [indicating]? It would be northeasterly, and that is correct, is it not?

A. Yes, sir.

Q. Now, about the distance. Now suppose that a person leaves that point [Foster's house] and comes out here and goes to Broadway, and then comes up to the gate, there [indicating] is the Mettman residence?

A. Yes, sir.

Q. I will ask you, for the present, if you have been all over the ground.

A. Yes, sir.

Q. That [indicating] is the Mettman house and it fronts to the north on Dacota street?

A. Yes, sir.

Q. Coming out of that house there is a little creek here, is there not?

A. Yes, sir; just before you reach Ninth street.

Q. After you come up this way there is a bridge?

A. On what street?

Q. At the junction of Ninth and Pawnee.

A. Yes, sir; there is some creek that runs down through here [indicating].

Q. And there is a bridge there?

A. Yes, sir.

Q. Let me ask you if there is not a hill close to the Mettman house?

A. No, sir.

Q. Is there not a hill that lies close to the house?

A. Yes, sir; a part of it is hilly.

Q. The west line of the Mettman house is on a hill?

A. Yes, sir.

Q. And the hill continues right through the block up to Sixth street?

A. No, sir; it don't. There is no hill on the north side of the street.

Q. At all events, if you come out that way [indicating] and cross Sixth, I will ask you whether you cross streets or go diagonally to this gate.

A. You can not go diagonally, because the country is all built up.

Q. Then, in order to reach this gate, you go up to Metropolitan avenue and down that [indicating] way and then this [indicating] direction, or go across the open space?

A. Yes, sir.

Q. Now, I want another thing. I want to ask you, down there in that corner [indicating], that is where Mr. Fleming said he resided; he didn't say, but I will ask you if it is a large stone house, rock house, on Eighth and Pawnee?

Mr. ADY. Mark the Fleming place on that map.

A. Yes, sir; I can not recall it.

Q. Now, your best judgment as to the distance, in yards, from the Mettman place, by the route one would take if walking, from the Mettman house to that gate.

A. I simply want to say that I could not give the distance, because I could not be correct and I would not like to approximate.

Q. It is three blocks north. It is Dacota, Pawnee, and Cheyenne. It is three blocks to Metropolitan av., and it would be two whole blocks east?

A. I presume so.

87 Q. Besides that fraction of a block?

A. Yes, sir.

Q. Now, if these lines [indicating] indicate the location accurately, or nearly so, the Government fence you have mentioned, this one [indicating], you say would bear from the gate northeasterly?

Q. Then, if a person were walking and wanting to get in there in the night time, after leaving this Foster house and passing westerly, and should start on Broadway, or any other place, going up any of these streets, they would naturally and probably enter this field at that gate, would they not?

A. If they were going this way [indicating].

Q. I don't care which way they went?

A. If I wanted to go in there I would climb over the fence; if not, ordinarily I would go through the gate.

COURT. Never mind going so much into details.

Redirect examination:

Questions by Mr. ADY:

Q. Mr. Schindler, suppose a person starting at this point [indicating] and following this ravine down to Twomile Creek, and then following Twomile Creek on its course down to the Missouri River, would that be an open and visible path where a man could be easily observed?

A. No, sir.

Q. What would be the matter?

A. Because it is hidden from the road. The gully as it starts from the southern boundaries of the reservation towards Twomile Creek is hidden by the higher road leading to the fort and Leavenworth, and in passing under the stone culvert, under the road here, the creek can be followed all the way down to the Missouri, except until you reach the road over Fifth street crossing over here [indicating], you can not be discovered. Of course, anyone is liable to pass.

Q. Supposing the person who killed Mrs. Mettman carried the fragments of the body down there in the night time what would be the opportunities for him to conceal himself and his burden if necessary?

Mr. WEBB. Objected to.

COURT. Put your question in the other form.

Q. Suppose a person walking down that path to the confluence of the Missouri River after nightfall with a burden, what would be the opportunity for him to conceal himself or his burden?

A. Very good.

Q. There is a bridge under the road?

A. Yes, sir.

Q. Where one could walk under?

A. Yes, sir.

Q. Have you recently been at the point indicated by the two red spots here [indicating] for the purpose of observing the opportunities for seeing over into the city of Leavenworth or from the city of Leavenworth?

89 A. I have, sir.

Q. You may state what houses directly south, I believe that is, from those points, one can observe when standing at those points?

A. The ground rises from the southern portion of the southern limits of the reservation until it reaches about more than midway upon the commons here, and then falls towards the gully, and standing where those spots are or in the vicinity at the head of the gully, you can not see any of the buildings south, except the tower, the cathedral and two or three

buildings which stand high, and three or four houses in Wilson's addition, and you are entirely hidden from the fort and from any person passing along this road; the ground falls very abruptly.

Q. Mr. Schindler, in passing along the fort road right opposite to where these spots were, what distance is the fort road from the spots?

A. From the road passing, this [indicating] road or this road running north and south? Which road do you refer to?

A. The fort road. The one running north and south?

A. It is quite a little distance, but I should judge that the distance from the head of the gully is not quite so far as the distance from the gate to that point.

Q. State whether or not a man of my height in the gully could be observed from the road?

A. No, sir; he could not.

Q. How is the road, on a level or graded and cut?

A. The road is on a level; no, sir; it is a little lower at this [indicating] point; beginning at this point here [indicating] running north and south, the road is a little lower than the surface, because it is cut down. The cut begins right there [indicating].

Recross-examination:

Questions by Mr. WEBB:

Q. Now, Mr. Schindler, place yourself for the purposes of my investigation, at the head of that little gully where the teeth were found, or said to have been found, and I will ask you if it was possible for any man of Mr. Ady's height, or any height, to walk down that gully and keep down the gully to Twomile Creek without being seen?

A. Yes, sir.

Q. Did you ever try it?

A. I never had occasion to walk through the gully.

Q. Is it not a fact that for a considerable distance it is full of briar bushes—the gully itself?

A. I can not say.

Q. Very well; is it not a fact that that gully is washed in places so deep and in some places so wide, and the ground very rough, and by reason of the uneven surface of the soil, that the gully winds around?

A. It winds to some extent.

Q. Is there any place, unless you should get right into the gully itself, which has been washed by the water so that the water would run down all the time; is there any place that one could walk from the head of that gully down to that creek without going up and down, and without half the time being in sight of the road that leads to the fort?

A. And keeping out of sight?

Q. I asked you if a person could walk from the head of that gully, in the gully down to the place where the gully empties its waters into the creek, if there is a place where the person would be out of sight of persons passing along the fort road?

A. A person could walk the greater part of it, nearly all the surface unbroken surface, without any passer-by on the road leading to the fort seeing him.

Q. When you reach Twomile Creek about near where the culvert is, counsel asked you if you could go down there on the railroad track, or

something to that effect. I will ask you if the Kansas Central track is not considerably north of Twomile Creek? I mean thirty or forty feet?

A. It is just a step or two.

Q. Is it not thirty or forty feet?

A. It might be; but it is a very small distance.

Q. Is there not a wire fence between the creek, and that railroad track?

A. There is a wire fence running up——

90 Q. Will you answer my question?

A. I am trying to answer your question. The wire fence runs up to that abutment, or stone walls, and where it runs under the bridge it leaves an open space.

Q. Which way does that extend?

A. It is running west; south side of the railroad.

Q. Is not that fence between the railroad and Two-mile Creek?

A. It is.

Q. If you should cross or go over that wire fence or th'ough it on to the railroad track and cross under the Government road and you have got on the north side of the Government road, what distance is it from there to Twomile Creek?

A. After you cross the road you mean?

Q. Yes, sir.

A. After you cross the road to the fort, well, of course, the creek is not a great distance; in fact, the railroad is right upon the bank of the creek; somewhat broken ground, but it is pretty well on the bank of the creek.

Q. Then a person walking down the railroad track might pass a railroad train and have to get off?

A. They run so few trains on that road that you are not liable to meet a train once a month.

Q. If a person were walking down the bed of the creek close to the railroad track a person upon the track would be in sight of and speaking distance?

A. He could be from the railroad track.

COURT. I do not wish to limit you, but is it material to ask about a man on a railroad track?

Mr. WEBB. I think at some future time we shall ask the court that the jury in charge of a bailiff shall be taken to the Foster house, the Mettman house, and from there to place where teeth, etc., were found, and down gully and creek to where body was found.

COURT. That order shall be made. I will allow that to be done.

91 ROSA BENSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

By Mr. ADY:

Q. Your name is Rosa Benson?

A. Yes, sir.

Q. What is your age?

A. Eighteen.

Q. You are the daughter of the defendant?

A. Yes, sir.

Q. You reside in Leavenworth?

A. Yes, sir.

Q. Have all your life?

A. No, sir; only about eight years.

Q. Do you remember about the time of the disappearance of Mrs. Mettman?

A. No more than what I read in the paper.

Q. Do you remember seeing your father on the 23d day of March, 1890, Sunday the 23d; the day Mrs. Mettman was supposed to have disappeared?

A. Yes, sir; he was home.

Q. When did he come home?

A. I can not remember.

Q. Did he come that day or the night before?

A. I think he came home the night before, or real early in the morning?

Q. He was at home in the morning?

A. Yes, sir.

Q. Where was he during the day?

A. He was home all day.

Q. Up and around or asleep?

A. Yes, sir; up and around.

Q. What time did he leave home that day?

A. I think it was five o'clock or a little before; he said that he wanted to get back to Kansas City that evening. It was five o'clock in the afternoon Sunday; I know it was real early.

Q. When did you next see him?

A. A week from Sunday; it was Palm Sunday.

Q. Were you at home?

A. On Sundays I was; not during the week; just Sundays.

Q. What time did he come home next time; that is, the week from that Sunday?

A. I don't know.

Q. What time in the day do you remember to have seen him?

A. I came home at two o'clock and saw him then, and he had been there all morning.

92 Q. That was a week following the 23d?

A. Yes, sir.

Q. Did you have any talk with him, or hear him make any remarks about the death of Mrs. Mettman?

A. In the meantime she had been discovered, and I brought home the papers with the account of it, and we talked over it, as people generally do.

Q. You brought home the papers on Sunday?

A. Yes, sir.

Q. What did he say about it?

A. I cannot remember the words; he expressed his regret.

Q. Did he exhibit any money on that occasion?

A. Yes, sir; he had some bills; he stated that he had been paid up.

Q. Do you know about what amount?

A. I should judge it was not more than seven or eight dollars; maybe more.

Q. Did you see any gold coins at that time?

A. No, sir; just bills and silver.
Q. He said he had been paid off?
A. Yes, sir.
Q. This was on Sunday that he told you he had been paid off? This was on Palm Sunday?
A. Yes, sir.
Q. A week after the 23d?
A. Yes, sir.
Q. That would be the 30th?
A. Yes, sir.
Q. When did you next see your father?
A. It was the last time I saw him until this past fall.
Q. Until when?
A. Until after he was brought under arrest.
Q. Now, the 30th of March was the last time you saw him?
A. Yes, sir; it was a year ago this past March.
Q. Did he on that Sunday tell you or your mother, in *in* your presence, about his intentions to go out of the country on Palm Sunday?
A. I cannot remember that he did.
Q. Did he at any time before leaving the country tell you anything about it; in a conversation, I mean.
A. Not to me; he might have to mother.
Q. Did you know anything about his intention to go out of the country?
A. No, sir.
Q. Did you sometime afterward go to Kansas City in company with your mother and Marshal Murphy?
A. Yes, sir.
Q. Where did you go to in Kansas City?
A. We went to 511 Bluff street.
Q. How did you happen to go there?
A. Well, before that we received those letters that were dated
93 from Kansas City.
(Webb, defendant's counsel, objects to contents of letters being talked about.)
COURT: She is stating the fact of having received the letters; she is not giving the contents of the letters.
A. I just simply stated that we received the letters, and it was through those letters we went to Kansas City.
Q. What did you do when you got there? What were you in search of when you got there?
A. We were in search of the household furniture belonging to my father.
Q. Did you find it?
A. Yes, sir.
Q. Where?
A. At 511 Bluff street.
Q. Describe where it was.
A. In the house. When we got there and asked for him they said he was gone, and the room was locked, and Mr. Murphy could not open it with the key, and he broke it open.
Q. What did you find in the room?

A. A complete bedroom set, and kitchen furniture, and articles of clothing.

Q. How large a room was it?

A. I could not give the dimensions. The room that the furniture was in was just a small room; the other room was a good-sized room.

Q. Besides the furniture, did you see anything else that was found there?

A. In the drawer of the washstand there was cigars and letters and one thing or another.

Q. I will get you to look at these slips of paper.

A. They are German, and I can not read them. All German handwriting looks the same to me. If I remember rightly, it seems to me those two pieces were in the drawer.

Q. And the other slips of paper, do you remember whether these correspond with the slips of paper found there in general appearance?

A. I think so; Mr. Murphy took them, and I did not pay attention.

Q. Did your mother read them?

A. She did not get a chance, but she wanted to.

Q. She saw them?

A. Yes, sir.

WEBB (defendant's counsel). What do you show her; those slips?

Mr. ADY. Yes, sir.

Q. Mr. Murphy, you say, took the slips away?

A. Yes, sir; the slips and the German letters.

94 Q. Did you ever see anything of that kind before [showing witness false mustaches]?

A. We found those in the room in an envelope.

Q. Whereabouts in the room?

A. I don't remember; do not know; I know they were in an envelope.

Q. Prior to your father's visit at home on the 30th, were there any pictures of your father in the house; any photographs?

A. No, sir; I thought he took them; I don't know; he had them taken before Christmas.

Q. You say he did have some?

A. Yes, sir.

Q. Pictures taken before Christmas?

A. Yes, sir.

Q. Had you seen any in the house?

A. Yes, sir; one in the album.

Q. State whether or not you looked for that after he was there on the 30th. Did you ever look for the picture after he was there on the 30th?

A. I did not open the album until we were asked to show pictures.

Q. Did you find it?

A. No, sir.

Q. Do you know how it disappeared?

A. No, sir.

Q. You may state whether or not your father had been living at home in the last months or years before this occurrence?

A. If I remember right he had been working in Kansas City since the May before this March; he had been there all summer and winter.

Q. How often was he at home?

A. Sometimes once or twice, he came home every other week, and then sometimes three or four weeks; and sometimes five weeks before he came home.

Q. During this time what, if anything, did he contribute towards the support of yourself and mother?

A. I do not know as he contributed very much.

Q. Did you ever ask him to give your mother money?

A. Yes, sir; I often said that I thought he ought to give more than he did.

Q. When he exhibited this money that you speak about did you make any request of him?

A. I said that he ought to give mother some money, so that she would not have to work so hard, and he gave me a quarter and mother a dollar in my presence.

Q. Was that all?

A. That is all I know of then.

Q. What do you know about your mother owning a house that
95 burned down some time before this?

WEBB (defendant's counsel). I do not know what that has got to do with this case, and I object to it.

Mr. ADY. I always hate to make these statements, because I do not like to have counsel make them, but, of course, the objection requires me to show the materiality. I hope to show by the witness that Mrs. Benson owned a house which was burned down, and that Benson collected the insurance money and appropriated it and used it for his own benefit, and refused to give it to his wife.

WEBB. It is incompetent, we think.

COURT. Supposing it is true, how is it competent?

ADY. Of course the evidence is not all before the jury yet, and I expect to show that it is material.

COURT. The objection will be sustained, and if you develop that it becomes material later on you can show that fact.

Cross-examination by W. C. WEBB:

Q. You say that your father was at home on Sunday, the 23d of March?

A. Yes, sir.

Q. Came home some time in the night, but don't know what hour?

A. No, sir; I was not at home at night.

Q. I thought you said you were home all day Sunday?

A. I was working and did not stay at home nights.

Q. How was he that day as compared with his usual appearance and manner? Was he agreeable or disagreeable?

A. He was just the same as ever.

Q. Did not note any difference at all; kind and pleasant with you and your mother?

A. Yes, sir; the same way.

Q. And you say he left home about five o'clock that afternoon?

A. Yes, sir.

Q. That was the 23d I speak of?

A. Yes, sir; that afternoon he left home at five o'clock.

Q. And said he was going back to work at Kansas City, as you understood?

A. Yes, sir.

Q. And then you went away from home and went to work in your service? You were working away from home?

96 A. I went away from home at seven o'clock.

Q. And did not return until two o'clock next Sunday?

A. Yes, sir; I was home on Wednesday evening between then and the Sunday following.

Q. The 30th of March you went home and there you found your father?

A. Yes, sir.

Q. In the meantime the body of Mrs. Mettman had been found, or was supposed to have been found, and you had read accounts in the papers and you had brought the papers home?

A. I brought them with me; yes, sir.

Q. The subject was talked about there by you and your father and your mother, was it not?

A. Yes, sir.

Q. What did your father say about Mrs. Mettman's death, if anything?

A. I can not remember the exact words, but he seemed to express his regret, and he didn't see what motive there was to kill her, as he thought she was an unoffending old lady.

Q. Let me ask you if you knew her in her lifetime?

A. Yes, sir.

Q. Did you know John Mettman?

A. I knew him slightly.

Q. Had you known their daughter?

A. Yes, sir; I knew her well.

Q. I will ask you if your father's family—let me ask you how many members are there of your father's family?

A. There is just myself and my mother alive.

Q. And your father here?

A. My father's family? No, I am not speaking of his family.

Q. He and your mother and yourself constitute the whole family?

A. Yes, sir.

Q. I will ask you if your family, the Benson family, and the Mettman family were on pleasant and agreeable terms?

A. We were until about just two or three years ago.

Q. How did your father appear as compared with his appearance on Sunday, the 23d of March, on that afternoon when you were talking with him about Mrs. Mettman's death?

A. I can not say as I noticed any difference; he seemed just the same as usual.

Q. Were you there when he went away on that day or did you leave home before he did?

A. I think I left home early; that was on the 30th of March.

97 Q. You think you left home before he did?

A. I think I did, but could not say for certain.

Q. You stated that you went to Kansas City with your mother and Officer Murphy?

A. Yes, sir; I did.

Q. And you there found some furniture belonging to your father, as you supposed, stacked up in a room at 511 Bluff street?

A. Yes, sir.

Q. And there was a larger room adjoining that small room was there?

A. Yes, sir.

Q. And the officer broke the door to get in?

A. Yes, sir; I know that he tried several keys but could not get it open.

Q. Counsel showed you a couple of articles that he called false mustaches, and you said they were found there in your father's room?

A. Yes, sir, they were; they were in an envelope.

Q. Had you known of your father having those or other false mustaches prior to that time?

A. I had not known that he had others before that, but I know he had them a long time ago when he made some kind of show.

Q. Is it not a fact, Miss Rosa, that your father was engaged at different times in making those little exhibitions of slight of hand performances, and in doing that didn't he have and use false mustaches?

A. He had several a long time before that, but he didn't give any of those exhibitions for a good while, not in a family circle.

Q. Let me ask you is not your father merry and always full of jokes and pranks?

A. Yes, sir; he always was at home.

Q. And abroad with all persons?

A. I suppose he was; I was not with him when he was away.

Q. I mean among the neighbors and acquaintances, with everybody that you saw him, and among family acquaintances, was he not always pleasant and jolly?

A. He was.

Q. Always quick and active and lively?

A. Yes, sir.

Redirect examination by Mr. ADY:

Q. Do you remember of having an interview with your father—some talk with your father in the court room a few days ago?

A. Yes, sir.

98 Q. Do you remember of his raising his hands at you that way (illustrating)?

A. Why, I don't think—I know once that he raised his hands to his eyes and I thought he was crying.

Q. Do you not remember of his raising his hand and the marshal interfered?

A. No, sir; the marshal was not inside the room.

Q. A day or two ago he did not grow angry at you in a talk with you?

A. The only thing—I didn't notice that he got angry, but I said that I did not think that he ought to ask me to interpret, but there was nobody in the room; there was no marshal in the room.

Q. You say that a good many years ago he had mustaches that he used when he was making exhibitions?

A. No, sir; I don't think more than five or six years ago.

Q. Since then had you seen them at all?

A. Well, there was a little box full of things belonging to him at home; I have never looked in it to see what was in it.

Q. What sort of exhibitions were these that he gave?
A. In what respect do you mean.
Q. Why the exhibitions that you refer to?
A. We just—I don't know just how to explain it. He would perform things that would make people wonder and laugh. We would have a small company, and he would perform them to pass the time.
Q. Do you know about his telling fortunes?
A. I know that he often did for amusement.
COURT. Do you live in Leavenworth?
A Yes, sir.
Q. What telephone number have you if we desire you?
A. 71.

99 E. C. MURPHY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:
Q. Your name is E. C. Murphy?
A. Yes, sir.
Q. You hold what position here?
A. I am chief of police at present.
Q. How long have you lived in Leavenworth?
A. 23 years.
Q. Are you familiar with the point over there on the reservation where the spots of blood, the teeth, and the muffler, and other things were found?
A. Yes, sir.
Q. How long have you been familiar with them?
A. 23 years.
Q. What grounds are those?
A. They are the Government reservation.
Q. The Fort Leavenworth military reservation?
A. Yes, sir.
Q. Did you see the spots of blood there?
A. I did, sir.
Q. You may describe them to the jury.
A. There were three large spots of blood, and between the first and third one there were small spots as though some one was struggling there; the first large spot of blood we had taken up with a shovel; that is, the sod about three or four inches deep, perhaps, and I had it taken to the office, and I don't know what became of it, but had it in the office some time.
Q. Some time after the discovery and burial of Mrs. Mettman did you go to Kansas City in company with Mrs. Benson and her daughter?
A. Yes, sir.
Q. What for?
A. I had information where Benson was rooming, and I told Rosa and her mother to go down with me if they choosed, and we went down and found the room on Bluff street.
Q. Prior to that had you made search for Benson?
A. Yes, sir; I was in Kansas City three or four times.
Q. Have a warrant?
A. No, sir; just went down to look.
Q. Did you find him in Kansas City?

A. No, sir.

Q. About what time was it that you went down to this house on Bluff street?

A. I don't remember; it was some time after the finding of Mrs. Mettman

Q. Did you finally get into the room?

A. Yes, sir.

Q. How did you gain entrance?

A. The lady in charge of the house—there were two locks—one, the key to which belonged to the lady in charge of the building, and one which Benson put on when he left, and she gave me the key to her lock and told me to go in the best way I could, and we got in and found Benson's household goods there.

Q. What did you find in the room?

A. We found his household goods and some of Mary Rautzahn's clothing?

Q. Did you find that valise in there?

A. Yes, sir; we found that valise.

Q. And the contents you found there?

A. Yes, sir.

Q. You can just open it up so the jury can see in a general way what it is.

A. (Witness opens valise for inspection of jury.) Here is knives and forks that belonged to Mary, and here is a blanket. I found those saws.

Q. These saws?

A. Yes, sir.

Mr. ADY. We offer these saws in evidence.

Q. Now, these articles of family apparel you can lay them there where you can use them after a little. Was this muffler in the outfit there?

A. Yes, sir.

Q. And these (exhibiting false mustaches)?

A. We found these in the washstand drawer.

Q. These mustaches you say you found in the room?

A. Yes, sir; in the washstand drawer.

Q. You turned them over to who?

A. I turned them over to Mr. Atwood or Mr. Soper; Soper, I guess.

Q. Now look at these slips of paper until you are satisfied, and then tell me where you have seen them before.

100 Mr. WEBB. What did you show him?

Mr. ADY. Slips of paper.

A. Some of those we found in his room, and he had written a letter up here.

Mr. WEBB. Never mind that.

COURT. Answer the question.

A. I would not swear all of those were found in his room; some of them was; they being German, and I not understanding it, you know.

Q. What did you say about those? I was busy at the time.

A. If I remember, part of them were found in his room.

Q. That is, you recognize them; part of them that you found?

A. Yes, sir.

Q. You turned the bunch over to who?

A. I would not be positive whether Mr. Atwood or Mr. Soper; Mr. Doane had them also.

Cross-examination:

Questions by Mr. WEBB:

Q. I would like to have you, Mr. Murphy, if you will, take each of those garments there and just give it a common name, as a coat or dress, so that I can write them down.

A. There is a pair of overshoes that belonged to Mary, and this is a blanket which belonged to Mary.

Q. That is a Government blanket, is it not?

A. I don't know. This is a muffler that Mary gave Mr. Benson, I understand, or Rosa, and this [indicating] is a dress which belonged to Mary.

Mr. WEBB. You are a little too fast. How do you know this?

A. I got this information through Rosa; she knew all the pieces.

Q. The next after overshoes was a dress?

A. Overshoes, muffler, and dress; and here [indicating], I don't know what you call them; they are pillow shams; there are three pieces.

Q. Three pillow shams?

A. Yes, sir; two short ones and one long one; and I don't know what you call this.

Q. I will call it a ladies chemise.

A. Night dress; here [indicating] is a cloak.

Q. A woman's cloak?

A. Yes, sir.

Q. Mr. Murphy, the articles you found there in the room and which you have mentioned, were delivered by you when you came to Topeka to who? No, I don't *don't* mean Topeka; I mean Leavenworth. What did you do with them?

A. I have had them in my possession ever since.

Q. You said you put some things in the possession of Mr. Atwood or Soper?

A. No, sir.

COURT. That related to the exhibits which he said he turned over.

Q. What articles did you deliver to Mr. Soper or Atwood? And designate the person.

A. I had all these articles before the grand jury and the grand jury looked at them and Mr. Soper did.

COURT. The point is, Mr. Murphy, what articles did you turn over to Mr. Atwood or Mr. Soper?

A. I remember turning over the slips and false mustaches to Atwood or Mr. Soper, but don't remember which.

Redirect examination:

Questions by Mr. ADY:

Q. Mr. Murphy, did you see the muffler that was picked up by the spot of blood?

A. Yes, sir.

Q. Did you see when it was picked up?

A. Yes, sir; I was there.

Q. Did you afterwards see that muffler exhibited to Mary Rautzahn?

A. Yes, sir.
Q. Was it the same muffler?
A. Yes, sir.
Q. It was the same muffler? You are sure about that?
A. Yes, sir.

Cross-examination:

Questions by Mr. WEBB:

101 Q. Do you know where that muffler is?
A. No, sir; don't know what became of it.
Q. Who picked it up?
A. In my judgment it was Mr. Powell that picked it up.
Q. Never mind. Who had it when it was shown to the grand jury?
A. That, I don't know.
Q. Who produced it before the grand jury?
A. I don't know; it was not in the grand jury room.
Q. I mean who showed it to Mary Rautzahn?
A. Mr. Doane did; he was chief of police then.
Q. How long had it been between the time that the muffler was picked up by Mr. Powell down to the time that Mr. Doane showed it to Mary Rautzahn?
A. I don't remember; could not say.
Q. Was it a week or two or three weeks?
A. Between two and three weeks to the best of my recollection.

MAX GROENFELDT, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY.
Q. Your name is Max Groenfeldt?
A. Yes, sir.
Q. You reside where?
A. Leavenworth.
Q. How long?
A. Almost four years.
Q. What is your occupation?
A. Editor.
Q. Of what?
A. The German Daily Post.
Q. What is your nativity?
A. I am from Germany.
Q. Are you familiar with the German language?
A. I am.
Q. Have you examined, for the purpose of translating into English, certain letters and slips of paper that have been exhibited to you?
A. I was requested day before yesterday to translate some slips of paper written in German.

Mr. ADY. We now offer, if the court please, in evidence, the letters identified yesterday morning by Mrs. Benson as the handwriting of the defendant, and also the several slips identified by Mrs. Benson as the handwriting of the defendant.

Mr. WEBB. We want to see them.

COURT. They are the exhibits offered yesterday.

Mr. WEBB. We didn't look at them; they were simply identified then.

COURT. You may look at them.

Mr. WEBB. We object to the introduction of those letters. Mrs. Benson went on the stand and testified that she was the wife of the defendant; she testified that these papers marked exhibit "A" and "B" and or "A" and "C" were papers which came from her husband in an envelope left at her home, as she supposed by the letter-carrier of this city, and that they were in the handwriting of her husband, and it appears on the face of them, and I think she so testified also, and the Government so claims, that they were letters written by the defendant to his wife during the existence of the marriage relation; that they are communications and statements made by a husband to his wife, and, therefore, not competent testimony to be used against him, and we object to the introduction of the letters.

COURT. If that is all the grounds of the objection it will be overruled.

Mr. WEBB. I don't know what the letters contain; they may be confidential; I can not read them; I have not had time; if you honor will bear until I run through them; I can not read German. These are the translations made by the witness on the stand. (Mr. Webb reads translation of letters.) I do not know that I have any further objection to make.

COURT. The objection will be overruled.

Mr. WEBB. I except to the ruling.

Mr. ADY. I offer, as I say, these letters in evidence. They are German and I can not read them.

Q. Mr. Groenfeldt, can you translate those letters into German?

A. I will try.

COURT. You may examine them and state whether you can or not.

A. I can make it out.

102 Q. Exhibit A. Mr. Groenfeldt, without interjecting any other words, begin at the beginning and read it through in English so that the stenographer will get it.

A. "Kansas City, April 11th, 1890. Mrs. Benson: I notify you that I have to leave Kansas City. I see from the papers that my name, C. A. Benson, is connected in them with awful lies; I can't bear it. What have I to do with Mettman's family? I am quite innocent of the whole affair. The cursed lying woman who accuses me of this wants to lay this on my shoulders. She is a false snake; she shall go to hell with her damned lies. Now farewell. Greet my daughter Rosa, for we shall never meet again, Mrs. Benson. Go to Kansas City and get my things, which are in 511——" (can not read name of the street).

Q. Is it Bluff street?

A. Yes, sir; "Bluf," only one f; "street, room number six. You will find a key in my old clothes, the other key I have with me. The furniture I bought for forty-five dollars. You have a right to fetch everything. Rent is paid up to the first of May, 1890. Don't believe that I have anything to do with the murder. Nobody in Leavenworth can say that I am guilty. Now I end and we are separated forever. Goodby, Benson."

Q. I now offer letter marked Exhibit C and ask you to read that.

A. "Kansas City, April 11th, 1890. Dear Mrs. Benson: I must notify you of the disgrace I have brought on you, for my name is in the papers and I am persecuted. It is a deep fall I made; I have deceived you horribly, you, my good wife. I had a secret love affair for over three years with Mrs. Rautzahn. She was during the whole summer and the whole winter with me, the first week with me in Kansas City, and has kept house for me. Mrs. Chauncey is a witness for it and can swear to it. She lives on Sixth and McGee streets east; her husband is a painter; she knows everything. Another witness is (Mrs. Lowe or Lauer, I can not make it) Mrs. Lauer; she lives still in the same house, 511 Bluff street; my room is No. six. Look at your house among my old iron, there you will find a key that fits the lock in my room, and fetch the other things which I bought for fifteen dollars. You will find Mary Rautzahn's, her morning wrapper, her overshoes, her night shirt, her knives, pepper box, all these things she procured in order to come next month with the children; but since the murder happened of the mother she wants to clean herself of the whole business and lays the blame on C. A. Benson, who is entirely innocent of the murder; she makes me and my whole house wretched. The authorities are looking for the murderer; they don't know that Mrs. Rautzahn knows everything. (Reads over.) The authorities are looking for Mrs. Rautzahn and don't know that Mrs. Rautzahn knows everything."

Q. Does Rautzahn occur twice in there or is it: The authorities are looking for the murderer? You repeated Rautzahn twice.

A. Excuse me, no; it don't happen but once.

Q. Read it as it is.

A. "The authorities are looking for the murderer; they don't know that Mrs. Rautzahn knows everything and that she is the cause of everything. She says in the papers that on the evening before the murder C. A. Benson had come to her yard and had intended to speak to the mother. This is a damned lie; C. A. Benson arrived Saturday evening, March 22d, ten p. m., at Mettman's, and Mrs. Rautzahn received C. A. Benson very warmly, and this is what Mrs. Rautzahn said to C. A. Benson. She said: 'Mother wants to see you,' whereupon I went into the house and Benson had a little conversation with Mrs. Mettman; whereupon Mrs. Rautzahn—(there is one-half of the line hardly legible, entirely blotted out)—whereupon Mrs. Mettman returned into the house and out came again Benson's beloved Mary Rautzahn and spent with Benson until Sunday morning, in deepest love, until between two and three o'clock. (I give you as it is written, poor German.) Then Benson went to the depot and went to Kansas City at six o'clock. (Judge, it is impossible to read one line, it is entirely blotted out.)

COURT. Very well, if you can not read it, proceed then.

A. "The Rautzahn is a false snake which knows everything; she will put it on Benson; also about the muffler; it is a damned lie; she
103 never gave me a muffler. I have once more to say that I am innocent of the whole murder, but not innocent in regard to my love affair. Mrs. Rautzahn is now Mrs. Waldo; one must ask for Mrs. Waldo, to whom she gave the four hundred dollars, for she knows the whole secret about the whole business. On the 22d of March I wrote to Mary—Mrs. Waldo—that I would come to visit her, not her mother. Mrs. Benson, now you know everything. Farewell, forever. I shall leave immediately Kansas City."

(Exhibit One shown witness.) "Mrs. Benson, hereby I notify you that I am married with Mrs. Rautzahn since last year; for over about six months my name is Richard Waldo, and Mrs. Rautzahn's is Mrs. Waldo. You will hear everything in Kansas City. All the people there are witnesses; even in the factory they knew it that I am married with Mrs. Rautzahn, now Mrs. Waldo, since last year. I gave a keg of beer. All the people will tell you that Mrs. Rautzahn, or Mrs. Waldo, has always presented herself as my wife; she is the only cause of the whole business; the mother didn't have the four hundred dollars with her; Mrs. Rautzahn should confess to whom she gave the money; then the world will know everything; the truth is the mother was in her way for a long time, and also you, Mrs. Benson, because she could enjoy better her hours of love; she is a miserable snake; one should hear Mrs. Rautzahn, then you will know everything; now she can better live in incest with her old man; now she is always alone with him; no, my dear, sweet girl you have believed that you could put everything on Benson, but Benson will show it to you, you miserable snake; how can you dare and bring Benson into misfortune since he is innocent of the murder, but not of the love affair with you during the last three years? Farewell, Mrs. Benson, forever. Fetch my things.

COURT. Is there a name signed to that?

A. No, sir; no name signed.

Q. I now ——

Mr. WEBB. I desire to say, if the counsel will let me, with the court's permission, Mr. Benson tells me while this witness is reading that he don't interpret these correctly. I propose that Benson should take the stand and read those letters in English, and this witness look right over his shoulder.

COURT. Mr. Benson can go on the stand if you offer him as a witness.

Mr. WEBB. I know he can, but he tells me that the witness has not interpreted quite a good many of those words.

COURT. The witness is subject to cross-examination, and Mr. Benson has the right to testify.

Q. I now give to the witness slip "D."

Mr. WEBB. I object to those slips; there is proof by Mrs. Benson that the six slips, marked from C to H, inclusive, and now I have information from the stenographer that they are marked from one to six inclusive; they are in the handwriting of her husband, Mrs. Benson says; I have not seen them. The point I want to make, your honor, is this: The witness, Murphy, the chief of police, of this city, who says he went to Kansas City, says that some of these papers were found in that room; he don't swear that they were all found there, and he don't identify any one of them that were found there——

COURT. Let me ask you what is the difference whether they were found in that room or some other place, so long as they are shown to be in the handwriting of the defendant; if there is no other objection, it is overruled.

Mr. WEBB. We except to the ruling.

A. (Witness reads Exhibit Two.) Mr. Soper wrote it; Mr. Soper requested me to translate it.

COURT. This is as he extended it from your translation?

A. Yes, sir; I dictated it. I have simply to say that it is badly blotted, poor German, and it is hard to interpret it.

Q. I now give you Exhibit Two, and ask you to read it.

A. Old Mettman is innocent of the whole affair; he don't know anything about the murder of his wife; Mrs. Rautzahn knows everything; Mettman never killed his wife; he don't know anything about the love affair of his daughter, nor about the murder.

Q. Is there any name signed to it?

A. No, sir.

104 Q. This little slip is written on both sides. Now I give you Exhibit Three.

A. "Mrs. Chauncey, painter, east Sixth and McGee streets. Dear Johanna. These are the names of the housekeeper, who will explain to you everything what she knows of Mrs. Waldo" (in parenthesis) "This is Mary."

Q. I will now give you slip or Exhibit Four.

A. Mrs. Lauer, 511 Bluf street, rooms 1, 2, and 3. This is the housekeeper, Mrs. Lauer; she knows Mrs. Waldo or Mary, who has kept house for me.

Q. I know give witnesses Exhibit Five and ask him to read that.

Answer. Dear Johanna: Since we shall never meet again I beg you a thousand pardons; forgive me everything; it was not my fault; the fault only was with Mary; she has lost honor, wife, and child, and now since she is alone with her father she wants to lay the whole blame on me, Albert. Mary knows well to who she gave the money; she knows the whole secret; I confess openly that I have nothing to do with the murder, but with Mary Rautzahn I had to do over three years; that is everything I have to say. Now goodby; forgive everything. Your husband. Albert Benson."

Q. I now give you Exhibit Six.

A. "Search my room; you will find everything that will give you a clew about Mrs. Rautzhan; you can pack everything; everything is all right with my satchel and in the satchel are her things; things belonging to Mrs. Rautzahn, morning dress. And then call on Mrs. Chauncey; she will tell you everything most accurately, that Mrs. Waido, Mrs. Rautzahn, has kept house for me, and that she has worn the same dress. Mrs. Rautzahn knows the secret about the four hundred dollars and about her mother. You will find a muffler, still new, a present of Mrs. Rautzahn. This is all. What I have in possession, not the muffler of which Mrs. Rautzahn says that it was Benson's; this is a mere invention, for she is a sneaking snake. She is always after married men. Benson has already spent on her several hundred dollars; she will confess; she only plays double."

Q. I now give you slip 1.

A. Now she wants to lay everything on the mother, because the mother can not say anything, in order that it may be said that Mrs. Rautzahn may be innocent; knows the mother knew everything about the love affair with her daughter and Benson. (There is one passage I can not make out.)

COURT. Pass it.

A. "When she said Mary was working she was in Kansas City with Benson and kept house for Benson. Now she wants to say that the mother wanted to see Benson. No, the daughter wanted to see Benson in order to gratify her love; now, since the mother is dead, Benson shall carry the whole burden, where she is the only guilty one. Benson has had nothing to do with the murder, only Mary. Another witness is a family Morris, West Ninth street, 1215, Kansas City, Missouri; they can testify that he lived at Mrs. Morris' sleeping rooms. Mr. Morris is a barber; he knows Mary Rautzahn or Mrs. Waldo; he knew that Mary Rautzahn or Mrs. Waldo came over three weeks on a visit; also the family Whiteman can testify. They lived in Garnett, Kas. They can testify that Mrs. Rautzahn was with me and known as Mrs. (it is blotted out).

Q. Is that the end of it?

A. Yes, sir.

Q. Did you have a regular German education?

A. Yes, sir.

Q. Where did you study?

A. I went to college, and then I was at the university.

Q. University where?

A. Bond, on the Rhine.

COURT. I shall give this witness an opportunity to extend these papers by the stenographer writing the notes and the witness can carefully compare the extension with the originals here in open court, and if he discovers any corrections the translation can be changed.

Mr. WEBB. That is what I desire, and I desire that the witness on the stand and Mr. Benson should compare them.

COURT. I will ask the stenographer to extend the notes of the translation and the witness will be furnished with the originals, so that he can compare them.

Court adjourned from Saturday at 4 p. m. until Monday, June 8th, 9 a. m.

105 Mrs. RAUTZAHN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Mr. WEBB. May it please the court, I suppose it will be admitted that the witness on the stand now, Mary Rautzahn, is the codefendant of C. A. Benson, and the person named in the indictment which was returned in this court as well against her as him. Is that the case?

Mr. ADY. Yes, sir.

Mr. WEBB. Then we object to her testimony in this case; she is not competent to testify at all, unless it shall also appear, which I have not been advised of, which would settle it, of course, that a nolle prosequi has been entered as to the witness on the stand; she is not competent if the indictment is still pending against her.

COURT. The objection is overruled.

(Defendants' counsel excepts.)

Q. State your name?

A. Mrs. Mary Rautzahn.

Q. What is your age, Mrs. Rautzahn?

A. I will be 29 the last day of August.
Q. Have you been married?
A. Yes, sir; I have been married.
Q. What is your husband's name?
A. Mr. Charles Rautzahn.
Q. About when were you married.
A. I was married to Mr. Charles Rautzahn on the 19th day of August, 1879.
Q. Had you children by him?
A. Yes, sir; I have had four children by him.
Q. Have you any children living?
A. Yes, sir; two children, a little boy and a girl.
Q. Is your husband dead?
A. Yes, sir.
Q. When and where did he die?
A. My husband was supposed to have been killed by lightning.
Q. I asked where it was? How long ago was it?
A. He left home the 11th day of July, 1885; when he was killed or where I don't know; only what I have heard.
Q. Where have you and your children lived since then?
A. I lived at Mount Morris, Illinois, for a short time after my husband's death until I could get ready to come to my father's house, and I have since made my home there.
Q. Where have your children been living since your husband's death?
A. With father.
Q. When were you arrested?
A. I was arrested on the 22d day of April, 1890.
Q. When and where did you first become acquainted with the defendant Benson?
A. At my father's house.
Q. In Leavenworth?
A. Yes, sir; up on Pawnee street between Broadway and Seventh.
Q. Where did you live then at the time you became acquainted with him?
A. At my father's house.
Q. Where is that?
A. On Pawnee street.
Q. Where was his house with reference to yours?
A. I don't understand.
Q. Which way was his house from your father's?
A. It was a little south or a little southwest.
Q. Near by it?
A. No, sir.
Q. About what distance from it?
A. It was over in North Leavenworth, away out on Spruce or 11th street somewhere.
Q. You say you became acquainted with him at your father's house?
A. Yes, sir.
Q. You may state whether or not an improper intimacy sprang up between you and him?
A. Yes, sir.

Q. How long ago did that commence?
A. In 1887.
Q. Upon whose proposition?
A. Benson's.
Q. Since 1887?
A. Yes, sir.
Q. Did you at any time go to live with him?
A. Yes, sir.
Q. When first and where?
A. In the spring of 1889 I went to Kansas City; that was as
106 far as I got; I started to Nebraska, but when I got to Kansas City he refused to let me go; he wanted me to go to Fort Smith, and I refused to go because he refused to take me where I started to go to.
Q. How long did you remain with him that time?
A. I left here Tuesday evening on the 4:19 train and came back next Monday evening about ten o'clock when I arrived at father's house.
Q. Where were your children during that time?
A. They were with me.
Q. When were you with him again?
A. Not until last spring; June or July; the month I don't remember.
Q. Do you mean this last spring, 1890?
A. 1889, I should say.
Q. In the spring of 1889?
A. Yes, sir.
Q. Where were you with him then?
A. At Kansas City.
Q. How long were you with him that time?
A. Only a few days. I had bought a return ticket and I didn't stay it out. It was good for five days.
Q. When, if ever, were you with him again in Kansas City?
A. From that time on I was with Benson about once in a month at Kansas City.
Q. At Kansas City?
A. Yes, sir.
Q. Staid with him at his room and lived with him?
A. Yes, sir.
Q. When you were with him where were your children?
A. At home with mother.
Q. Did your mother know where you were?
A. Yes, sir.
Q. Did she know the relation that existed between you and Benson?
A. Yes, sir; my mother made the arrangements with Benson, and Benson paid my mother to let me come and paid mother to take care of the children.
Q. You remember the night of your mother's disappearance?
A. I remember when she left home in the evening, yes, sir.
Q. Did Benson have any conversation with you prior to that time about her disappearance?
A. Not on Sunday, sir, but Saturday evening, sir, March 22d.
Q. Prior to March 22d had he had any conversation with you?
A. Yes, sir.

Q. About that subject?
A. Yes, sir; March 15th.
Q. That was what day of the week?
A. That was Saturday evening; Saturday night rather.
Q. I will get you to state, in your own way, what that conversation was that he had with you on March 15th.
A. Yes, sir.
Q. Tell when he came to your house and all about it.
A. Full conversation, sir?
Q. Yes.
A. Saturday evening, March 15th, C. A. Benson, the man who went by the name of Richard Waldo at Kansas City, came to my father's place; came into the back gate. I expected him and looked for him. Ten minutes past ten o'clock was the usual time when he arrived. When he stepped inside of the gate I said good evening to him and he said good evening to me. He said: "Where is father?" I told him father was in bed. He always wanted to know where my parents were so that he knew whether he was safe——

COURT. Confine yourself to the conversation occurring at that time. The question is, to repeat the conversation you had with him then.

A. He asked where father was. I said in bed. He said: "Where is mother?" I said: "Up in the house." He said: "I want to see her," and I left and went up to the house and got mother. Benson still staid at the back gate. Mother went out. She said for me to stay with the children until she came in. My mother went out and staid out a half hour conversing with Benson. When mother came in, then, she said: "Now, Mary, you can go out;" so I went out and went down stairs. Benson had come up to the back part of the house under the summer kitchen, and that place was where we generally sat and talked together. I asked him how he was getting along, and he says: "How is everything at home?" I told him everything was al' right. Benson said to me then: "Did I think that mother (meaning my mother) would give him away or tell on him?" Now, he didn't say tell what, or anything more. I said: "Nonsense, what would she tell?" Benson said: "If she tells on me or gives me away I will put a bullet through her head;" and he said, "I will do it so cold
that I will not take a second thought," so Benson said then that
107 mother was going to New York. I said to Benson: "She is going
to New York?" He said: "Mother is going to New York and you won't see her any more." I said: "If she goes to New York I can see her again." He says: "You won't see her any more." Benson says: "When you take that money" (meaning my brother's money), which Benson knew I had and which he had learned during the summer before, and Benson said, "then swear to me that you will not speak of it," which I did; swore that I would not speak of it until such time as I would be compelled to do so. Benson said then that I should take that money and he would see and take care that my mother would not come back to make trouble for me (meaning that if I took the money he would see that she would not come back to make trouble for me because I had taken it). What he meant was those words. I said then: "Benson, you will get me into trouble; you will bring me before the court." He said I should keep still and that I should not say anything.

Q. How long were you together that evening? What time did he leave?

A. About one o'clock when he left.

Q. Did you know where he went?

A. No, sir; said he was going to Kansas City.

Q. This was on the 15th of March?

A. Yes, sir.

Q. Did he make any arrangements to come back and see you again?

A. Yes, sir, I expected to see him again.

Q. When did he say he would come back again?

A. The next Saturday, sir.

Q. Did he come back the next Saturday?

A. Yes, sir.

Q. What time in the evening did he come?

A. Ten minutes past ten o'clock.

Q. Who were at home that evening?

A. Mother and father were both at home.

Q. Where was your father?

A. Which evening, sir?

Q. The 22d?

A. Saturday evening, March 22d, my father had just come in the house from working out in the back ditch that runs back of our place.

Q. Where was he when Benson came that night?

A. In the house in bed.

Q. Where did you meet Benson that night?

A. At the back gate.

Q. What conversation did you have then?

A. Which evening, sir?

Q. The 22d?

A. That evening Benson said still further that after my mother left home that she was going to New York, of course; that I was to come to Kansas City and live with him, which the arrangement had been made before anything was said about my mother going away; that is, there had been something said about my mother going to New York before that, but I was to go to Kansas City and live with Benson, and Benson said that after I would be in Kansas City my brother, who is Henry, was to meet with an accident, which was to cause his death, and then my father, who if Mr. John Mettman, was to get my brother's insurance——

Q. Life insurance?

A. Yes, sir; and accident insurance; I don't know exactly; my father was to get my brother's insurance, and after the following spring, after my brother was to meet with this accident, I was to come back to him; Benson was to send me back home to live with my father, and that my father would not live a great while longer, and I would get what was left; I would fall heir to what was left.

Q. During your acquaintance with Benson what professions did he make of ability to foretell the future?

A. When my mother first introduced me to Benson, she introduced me to Benson as a man who could prophesy.

Q. What did he say about your father?

A. That after I left that I would not be there a great while before he would be killed; he didn't say exactly killed, but that he would meet with his death; that I would not be there a great while before I would come to him again; I don't know hardly how to express it, but he expressed himself as being able to do most everything that way.

Q. Now, on this evening of the 22d was there any interview between your mother and Benson?

108 A. Evening of the 22d; yes, sir, my mother and Benson conversed together about half an hour.

Q. Had you talked with him before he talked with your mother?

A. No, sir; not more than good evening and asked where father was; I asked him how he was and he said well.

Q. Why did you go in and call your mother?

A. Because Benson said he wished to see her.

Q. How long did they talk together?

A. About a half hour, in my judgment.

Q. Where were you during that time?

A. In the house with my little boy.

Q. After your mother returned what did you do?

A. She said: "Mary, you can go out," and I went and talked with Benson.

Q. How late did you and Benson stay together that evening?

A. Until about one o'clock, sir.

Q. Where did he go?

A. He said he was going to Kansas City.

Q. Did he say anything about going home in Leavenworth?

A. No, sir; he claimed to me that he was not going home at all that time.

Q. That evening, what was said about this four hundred and forty dollars, your brother's money?

A. Nothing more than that Benson said I should take that money, and saying that if anybody should ask me about the money I was to say that it disappeared with my mother.

Q. Was anything said about your mother disappearing?

A. Yes, sir; he said that she was going to New York.

Q. When did he say she was going?

A. He didn't say then, but on the 22d. This conversation I am telling occurred on the 15th.

Q. I want what was said on the 22d.

A. On the night of the 22d; that night Benson said that mother was going to-morrow or the next day; that meant Sunday or Monday; and to-morrow was Sunday and the next day Monday.

Q. What answer did you make?

A. My mother had never said anything, and I wanted her to say a word about her going before I could say anything; he said when she left he would meet her on Broadway.

Q. What did he say, if anything, about you getting the money when she left?

A. I don't understand.

Q. What did he say about you getting the $440?

A. I was to say that it disappeared with my mother.

Q. What were you to do with it?
A. I was to hide it some place.
Q. Recalling to your mind Sunday evening, March 23d, the next evening; the evening your mother disappeared, and who was at home that evening when your mother went away?
A. No one but myself; I was in the house; my father and the children were in the stable; no one else about the place.
Q. Had your brother been home that evening?
A. Brother left shortly before to go on the train.
Q. How much was that money?
A. I don't know; I didn't count it.
Q. What kind of money was it?
A. All gold, sir.
Q. What pieces?
A. Twenty-dollar.
Q. Many of them?
A. There was quite a lot of them.
Q. What was it kept in?
A. It was wrapped up in a white rag inside of a white sack.
Q. Where was the bundle kept?
A. In my bed, sir.
Q. Did you mother know of that money?
A. Yes, sir; my mother had it in her care when I was away.
Q. Did you or your mother carry it with you?
A. Yes, sir; my mother carried it a couple of times: once during the summer before when we went to a picnic, and another time when there was a circus.
Q. Were those all the occasions you know of her carrying it?
A. Yes, sir; all I know of.
Q. I will ask you something further. In what health was your mother that evening?
A. Very good health.
109 Q. What spirits was she in?
A. Very good spirits, sir.
Q. How was she dressed?
A. When mother left home she was dressed in a black Alpaca trimmed with pieces of black velvet. It was not made in the latest style. It was an old dress, a thick grey shawl, and black straw hat.
Q. What time did she leave that evening?
A. Shortly after five.
Q. Did she take take any baggage?
A. No, sir; she went empty handed.
Q. Were you in the house when she went out?
A. Yes, sir.
Q. Did you know where she was going?
A. No, sir.
Q. Prior to that time what had been your mother's habit as to going out?
A. Mother went out a great deal of evenings and staid until a late hour.
Q. Alone?

A. Yes, sir.

Q. Do you know anything about your mother professing to be a fortune teller?

A. Yes, sir; she went around on that business a great deal.

Q. Anything else?

A. She was selling yeast, which she took with her.

Q. What hour did you say it was when she left?

A. Shortly after five, Sunday evening, March 23d.

Q. Did you hear any conversation between her and your father?

A. The last words I heard—I was looking out of the window to the sidewalk, facing east ——

Mr. WEBB. I object to her stating what was said.

Q. State what trouble there was, if any, between your father and mother.

A. None whatever.

Q. State what trouble there was, if any, in the family.

A. None; only except the children were in mother's way, and I had made arrangements to go to Kansas City and live with Benson, but there was no words or ill-feeling, except mother was worried about the children. I knew my children were making trouble for my mother, and, therefore, I had concluded to take my children and go to Kansas City and live with Benson, being as I knew my children were worrying my mother and my mother and father were living well together, and I thought it was not my place to leave the children to make trouble for mother.

Q. That, you say, was all the trouble you know of?

A. Yes, sir. My father, mother, and brother, and I have put in the past year better than we had before in years. Before that there was trouble, but this last year we lived together better than any other time that I know of.

Q. Did you ever see your mother after she left?

A. No, sir; didn't lay eyes on my mother at all after she left the house.

Q. Which way did she go?

A. As far as I could see her she was going east on Dacota street.

Q. Alone?

A. Yes, sir.

Q. That night after she left what did you do?

A. I sat up on the trunk looking out of the window, and went to bed shortly after father did. It was early. I didn't go to bed, but laid down in my bed, because I knew the door was locked and knew my mother was out and expected her any time, and that I would have to get up and unlock the door; and I laid there and fell off in a doze, and in one or two hours I waked up and thought that mother might have been at the door, and I went out to see if she was there and opened the door and didn't see anything, so I went in, that is, from the door near the window, and looked out of the window, and I thought perhaps she had went to the closet and I gave her time to get back, and then I saw she was not coming and I took the light from the bureau and held it up to the clock, and it was then twenty-five minutes after nine, and I knew it was kinder early; that she never came in before half past nine or ten, and I then knew she had not been at the door?

Q. What did you do the rest of the night?

A. Sat up on the trunk the rest of the night expecting her home. I knew if I laid down I would go to sleep, and I wondered where she was and why she didn't come.

110 Q. Did you really expect her to return?

A. Yes, sir. If she had taken anything with her, I would have expected what Benson said; but for my mother to leave empty-handed and start for New York I didn't expect, and I expected her to return.

Q. What time did Mr. Mettman get up the next morning?

A. About five o'clock, sir.

Q. Were you up at that time?

A. Yes, sir; I was up. I was not up; but I had been up when he got up, and when he came out into the kitchen I just started into the room. I didn't know he was up.

Q. What time did your father go away that morning?

A. He went away about six o'clock to work, sir.

Q. What search, if any, did you or your father make for your mother?

A. When father got up I told him that mother had not got home. He said he seen nobody was sleeping in the bed. He said, "I guess she staid somewhere, and will be home after awhile."

Q. Where was your brother then?

A. My brother was not home.

Q. What hour did he return?

A. Between ten and eleven o'clock, as near as I can remember.

Q. When he returned, what search, if any, did you make for your mother?

A. I asked my brother——

Mr. WEBB. I wish counsel would not assume that searches were made.

COURT. Ask what search, if any. [To witness.] Do not repeat conversation.

A. I told brother about mother going away.

Q. In the mean time, had this money been removed or displaced?

A. Yes, sir.

Q. When was that done?

A. In the morning. When I saw mother was not coming, I thought of what Benson said; and as he told me to take the money, I took the money out of my bed and put it in my bureau drawer and locked it, and there it was.

Q. When did you next see Mr. Benson?

A. Monday night, the same evening, after eight and before ten o'clock.

Q. Where?

A. Down in the basement. When Benson came to the house I was sitting inside the window, on the trunk. As I expected him, of course, Monday or Tuesday night, I sat there looking for him until after the time had expired. So when Benson came—he came on the sidewalk; I could see him through the window—I had a white rag tied around my head, and I took that off and motioned for him to go back, and Benson went back. My father was not quite asleep. I went out of the door in my stocking feet and went down, and Benson was where the sidewalk runs back of the kitchen. I said to Benson these words—I have always called him Albert: "Mother went away shortly after five and has not returned. Have

you seen or heard of her?" He said: "Why should I know? Am I your mother's keeper?" When he spoke those words we were walking down towards the back gate. When we got down there Benson said to me: "Mary, give me that money and do not keep me waiting here long." I said: "Albert, how can I give you that money; it is not mine." While I said those words Benson raised his hat, and I saw he had a cloth wrapped over his head. It was tied this [indicating] way, and across over the head this [indicating] way, and it was wrapped around his head twice. Then he said to me: "Mary, where is it. Get it for me immediately." I started to the house to get the money, took it out of the bureau drawer, where it had been placed, and brought it down and gave it to Benson. He kissed me good-by and left.

Q. This money—what was it?

A. My brothers's money.

Q. Those gold pieces?

A. Yes, sir.

Q. Why did you turn the money over to him?

A. He told me to take it, and I took it, and he asked me for it; and as I was afraid of Benson, I took the money and gave it to him. He told me to go and get it for him immediately and not keep him waiting, and I went and got it.

Q. Why were you afraid of him?

A. When I was down at Benson's the first part of March that he wrote for me to come, he told me he had something to tell me. I arrived
111 there some time during the day; don't remember whether the evening of that day or morning; but that evening after supper. At the supper table I said: "What was it you wanted to tell me?" He said: "I will tell you after supper." I was washing up the dishes, and he said: "Mary, you are the twelfth woman which I have now had. I have had eleven before you. Unless you will do as I want you to, or tell you, or will have you do, I will send you to hell, the same as I did the other eleven."

Q. You may state whether or not you were from that time in fear of Benson?

A. Yes, sir, I was; and before that, sir.

Q. Did your brother Henry know anything about you taking the money and turning it over to Benson?

A. No, sir.

Q. Well, what did you do that night—the night you turned the money over to him, and he kissed you and left?

A. I went up to the house, and thought——

COURT. Never mind.

Q. Did you sleep any that night?

A. No, sir, didn't sleep much; I could not; I went to bed.

Q. When did you make up your mind, if ever, prior to the discovery of your mother's body, that she had been killed?

Mr. WEBB. I object to that question.

Q. What search was made for your mother during the week before the body was discovered?

COURT. That must be confined to the search within the knowledge of the witness.

Mr. ADY. I will omit the whole subject.

COURT. The witness may testify to any search made by her.

Q. Did you see the remains of your mother that were taken from the river?

A. No, sir; I didn't see anything of my mother at all until she was brought into the house.

Q. I mean after the remains were brought to the house?

A. I saw my mother; yes, sir; I saw her then.

Q. It was your mother, was it?

A. Yes, sir; I am positive.

Q. The clothing she had on when the body was brought in—state whether or it was the same she wore when she left?

A. No, sir; all my mother had on was a shirt.

Q. Did you see the clothing found with her?

A. No, sir; I was shown nothing.

Q. Did your mother wear false teeth in her lifetime?

A. Yes, sir.

Q. Which set?

A. Upper set, sir.

Q. Could you identify them; have you seen them so you would know them?

A. Don't know that I could say they were hers; there is no mark; I can say that they look like my mother's.

Q. Were they like these?

A. Turn the other side please. Yes, sir; those look like my mother's.

Q. Mrs. Rautzhan, do remember after being put under arrest of a muffler—a triangular piece of one—being exhibited to you?

A. Yes, sir.

Q. Who exhibited it to you?

A. Mr. Atwood first showed it to me.

Q. Do you remember Marshal Doane exhibiting it to you?

A. Yes, sir, and Mr. Tracy Mace, I am positive it was.

Q. Tracy Mace?

A. Yes, sir.

Q. Do you remember Marshal Murphy?

A. Yes, sir.

Q. You may state whether or not you had ever seen the muffler before?

A. I had seen a muffler the same as that muffler in Benson's valise at Kansas City.

Q. Had you ever had it in your hands—a muffler like that?

A. No, sir; I had touched it, and looked at it, but had not took it out to see how large it was or anything.

Q. State whose muffler that was, if you know.

A. I say my belief is that it was Benson's.

Q. During Sunday night did your father leave the house at any time?

A. No, sir.

Q. Did he leave the house any time during Tuesday night?

A. Not during the night, sir?

112 Q. I mean in the night?

A. After what hour, sir?

Q. After dark?

A. No, sir; he did not.
Q. Or did he any night during that week?
A. No, sir. You mean after the retiring hour?
Q. Yes.
A. No, sir; he did not.
Q. What, if anything, did your father know of the familiarity between yourself and Benson?
A. Nothing, sir, until Friday, April 18th; Mrs. Benson, supposed to be C. A. Benson's wife, came to the house and told father; that is the first my father knew of the familiarity between Benson and I.
Q. What, if anything, so far as you know, did Henry know of the familiarity?
A. Nothing, sir; no more than my father did, sir.
Q. What, if anything, did you ever see which indicated that there was a familiarity between your mother and Benson?
A. I know from what I have seen that my mother and Benson were familiar.
Q. Just state what you saw.
A. That is what I say—from what I saw.
Q. What did you ever see?
A. That is just what I was going to say. I had seen that Benson had taken my mother up and carried her across the floor to weight her, and had seen that Benson had sized up my mother's lower limbs from her knee bone, and can say that I have almost caught them in the action of intimacy in my mother's own house.
Q. I will ask you what articles, if any, so far as you know, did you have in Benson's room at the time your mother was killed?
A. I had a blue mother-hubbard front wrapper.
Q. Is that it?
A. That is it, sir; I will not lie.
Q. Do you know that?
A. That, sir, I bought for Benson with my own money, sir.
Q. Do you know that?
A. I had a pair of rubbers; I suppose they are mine.
Q. Do you know that blanket?
A. Yes, sir; that is my blanket.
Q. Do you know that cloak?
A. Yes, sir; that is my cloak.
Q. Do you know that?
A. That is my old dirty apron that I used to clean house with.
Q. Do you know that?
A. My night-dress, sir.
Q. Do you know these?
A. My knives and forks, sir.
Q. Where did you leave them?
A. At Kansas City, on Bluff street; I forget the number; but it was on the street that leads up to Fifth street from the depot.
Q. When you were at Kansas City with Benson, did he ever introduce you to anybody?
A. Yes, sir; he introduced me to a gentleman there supposed to be his boss or foreman; the name I don't remember.

Q. What did he call you there?
A. Called me his wife.
Q. What did he call his name?
A. Richard Waldo.
Q. Do you know where he got that name?
A. No, sir.
Q. Did you ever see anything of that sort around Benson (exhibiting moustaches)?
A. Yes, sir; he told me he wore them at some kind of plays that he played in.
Q. Did you ever see Benson have any weapons?
A. Yes, sir.
Q. What weapons did he keep?
A. Yes, sir; he had three that I know of, sir; three revolvers, sir; and he had a sabre.
Q. A sabre?
A. Yes, sir.
Q. Describe what it was.
A. As well as I can; it is what I would call a sabre; inside of a long case of some kind; I don't know whether I have called it the right name or not.
Q. Did he ever state to you what he kept the weapons for?
A. He said he kept them to make use of some time.
Q. Mrs. Rautzahn, did you see your mother killed or dismembered?
A. I didn't see my mother; I have taken an oath, and I say that I didn't see my mother after five o'clock until brought in the house.
Q. Do you know of your own knowledge who killed her?
A. No, sir.
Q. Was she killed at the Mettman house?
A. Not that I saw anything of that kind happen at my mother's house.
113 Q. Could it have been without your knowing?
Mr. WEBB. I object.
Q. You may state whether or not she was killed in your kitchen or other part of the house?
A. No, sir; nothing in the way of a murder done under that roof.
Q. Do you know what your father did with his wages?
A. Brought them home and gave them to mother; and my father and mother went up to the store and paid the bills.
Mr. WEBB. Objection.
Q. Do you remember how much he got a month?
A. Thirty dollars.
Q. What part of his wages did he turn over?
A. Turned it all over, sir.
Q. For how long a time had he been doing this?
A. He had been doing that for a number of years.
Q. How many years had he worked at the fort?
A. That I don't remember; during all the years he worked there I have known him to miss twice.

Cross-examination:

Questions by Mr. WEBB:

Q. You said you had been under arrest from the 22d of April, 1890?

A. Yes, sir.

Q. Charged with the murder of your mother?

A. Yes, sir.

Q. Kept in the jail by the officers of the law ever since?

A. Yes, sir.

Q. Under indictment in this court for the killing of your mother?

A. Yes, sir.

Q. You know that this man Benson, that you have mentioned, is jointly indicted with you, don't you?

A. Yes, sir.

Q. Both of you named in the same indictment?

A. Yes, sir.

Q. Charged with the same killing?

A. Yes, sir.

Q. You said you became acquainted with him in 1885?

A. Yes, sir.

Q. You said he was introduced to you by your mother?

A. Yes, sir.

Q. At your father's house?

A. Yes, sir.

Q. And in the same year you became criminally intimate with him?

A. Not in the same year, sir.

Q. You said 1887?

A. Yes, sir.

Q. That you had criminal intercourse with him in 1887?

A. Yes, sir.

Q. And I will ask you if that was not kept up until the 22d day of March, 1890?

A. Yes, sir.

Q. Is it not true that you went away with him; went to Arkansas?

A. I didn't go to Arkansas; I started for Nebraska.

Q. What year was that?

A. The spring of 1889, sir; excuse me, sir; not 1889; in the spring of 1888, sir.

Q. Where did you start for?

A. Nebraska, sir.

Q. Did you leave here with Benson, or meet him in Kansas City?

A. Met him at Kansas City.

Q. Expecting to go to Nebraska with him?

A. He was to take me there, sir.

Q. You expected to go with him, and you expected to play the part of his wife, or be in fact his mistress on that occasion?

A. Yes, sir.

Q. You did meet him in Kansas City, and staid at the hotel, did you not?

A. Yes, sir; I staid there with him at a hotel, I suppose it is.

Q. And did play his mistress there at that time?

A. Yes, sir.

Q. From the spring of 1888, when did you next go away from Leavenworth to meet him?

A. In June, 1889.

Q. Between the spring of 1888 and June, 1889, were you and he not frequently together?

A. Part of the time; yes, sir.

Q. Where?

A. Out at Benson's house, sir.

Q. You know where his wife and daughter live here?

A. Yes, sir.

Q. Is it not a fact that you went to his house and was there intimate with him, in his house, a great many times?

A. Yes, sir.

Q. And in June, 1889, you went with him to Kansas City, or went and met him there, which?

A. I went and met him there.

Q. Pursuant to an agreement between you and him, previously made?

A. Sir?

Q. You and he had agreed that you should come, and the time of your coming?

A. Yes, sir.

114 Q. And you performed that agreement and went?

A. Yes, sir.

Q. And from that time down to March, 1890, you were with him at Kansas City as often as once a month?

A. Yes, sir.

Q. Staying several days and sometimes a week?

A. No, sir; I always bought a five days' ticket.

Q. I didn't ask you what you bought. How long did you stay with him?

A. Three or four days at a time; I never exceeded a full week.

Q. Your mother knew that you were intimate with him?

A. Yes, sir.

Q. And you say that you knew that your mother and he were intimate?

A. Yes, sir; I was positive.

Q. Enjoying the pleasures of his love at the same time that you knew that he and your mother were enjoying illicit love?

A. Yes, sir.

Q. You leaving your father's roof to meet him in a neighboring city to carry on that illict love?

A. Yes, sir.

Q. Leaving your children on such occasions with your mother, who was also his mistress?

A. Yes, sir.

Q. You lived with him in Kansas City as his wife?

A. Yes, sir.

Q. He introduced you to some person or persons as Mrs. Waldo, his wife?

A. Yes, sir.

Q. And he there went under the name of Richard Waldo?

A. Yes, sir.

Q. And you were known to his acquaintances there as Mrs. Waldo?
A. Yes, sir.
Q. When did you first go by the name of Mrs. Waldo?
A. In the spring of 1889, when I went to Kansas City the first time, to meet Benson.
Q. He called you Mary and you called him Richard?
A. Yes, sir.
Q. He spoke to you of your father as father?
A. Yes, sir.
Q. And of your mother as mother?
A. Yes, sir.
Q. In March, 1890, you say he came to your father's house?
A. Yes, sir.
Q. On Saturday night, March 15th?
A. Yes, sir.
Q. Was that the first Saturday night that he had been there?
A. No, sir.
Q. Is it not the fact that he used to meet you there regularly every Saturday night?
A. No, sir.
Q. Is it not the fact that he met you there many times on Saturday night?
A. Not very many times; just a few times on Saturday night.
Q. Did he meet you on other nights than Saturday nights at your father's house?
A. He met me New Year's eve and Christmas nights, but I don't know whether it was Saturdays or not.
Q. You said in answer to the Government's counsel that you were expecting him; how did it happen that you were expecting him on these occasions?
A. He would write and tell me he was coming; or when I left Benson's house—it was a good many times so—he would tell me when he would come; he would have an almanac and he would point out and tell me the exact day, and therefore I would expect Benson then.
Q. He kept his word with you, did he not?
A. Yes, sir.
Q. And you kept your appointments with him?
A. Yes, sir.
Q. Those love affairs were matters that were not to be forgotten by you and him?
A. No, sir.
Q. And were not forgotten?
A. No, sir.
Q. When he came to your house Saturday, March 15th, who did he come to see?
A. Came to see me, sir.
Q. Pursuant to an agreement previously made?
A. Yes, sir.
Q. What did he first say to you when you met him?
A. He said good evening, and I did the same.
Q. Where did you see him?

A. At the back gate of my father's place.

Q. Suppose we get a little description of that. Your father's house stands on the south side of Dacota street, fronting north, about six feet back from the fence?

A. Yes, sir.

Q. There is a little hill on the west side of it close to the house?

A. Yes, sir.

Q. A person walking around that hill could reach the fence and see into the window?

A. By getting up on the fence, sir.

Q. They could do that by getting up on the fence?

A. Yes, sir.

Q. The house stands on the side of the hill about four feet above the ground?

A. Yes, sir.

115 Q. There is a basement under the house?

A. Yes, sir.

Q. And that basement on the south side is all open, with steps leading down into the basement?

A. Yes, sir.

Q. There is a stone wall along there, where you and he sat at night?

A. Yes, sir.

Q. Now, on the east side of that house there is a board walk leading from the front gate to the back gate?

A. Yes, sir.

Q. It passes close to the house, leaving room for a few steps?

A. Yes, sir.

Q. And there is a little board walk leading from the rear to this basement?

A. Yes, sir.

Q. The walk passing on down close to the barn, and the barn stands with east end higher than the hill there?

A. Yes, sir.

Q. Close to the barn there is a gate leading out?

A. Yes, sir.

Q. The barn door is within a few feet of that gate?

A. Yes, sir.

Q. Now, you met him at that back gate that night?

A. Yes, sir.

Q. What is the distance from the house to that gate?

A. That I can not tell.

Q. Is that the place where you said you met him on his visits?

A. Yes, sir; at the back gate.

Q. You talked with there at that gate?

A. Yes, sir.

Q. Took him up to the house?

A. Yes, sir.

Q. Tell us the conversation you had there that night?

A. On the night of March 15th?

Q. Yes.

A. On the night of March 15th, when Benson came in the back gate, he said good evening, and I said good evening. He said: "Where is father?" I said: "Father is in bed." He said: "Where is mother?" I said, she was in the house. He said: "I want to see her." I went in the house and told my mother Benson was down there and wanted to see her. My mother put a shawl over her shoulders, and she said: "You stay with the children until I come in." My mother went out and closed the door, and I went in the bedroom and staid with the children. My mother was out about half an hour, as near as I can judge it. No one was around there. My father was in bed, and I staid there watching my children, both asleep when my mother came in. She said: "Now, Mary, you can go out." I took her shawl and went out. By that time Benson had come up to the back part of the house, and I went around on the sidewalk and met him. I sat down on the step; and the first words Benson said to me was: "How is everything?" I told him everything was alright; told him I was well. Benson said to me did I think my mother would give him away, or tell on him. I said: "Nonsense, what could she tell?" Benson said to me, if my mother gave him away he would put a bullet through her head, and he would do it so cold that he would not take a second thought.

Q. You say you knew at that time that he and your mother were intimate? Do you mean as frequent as you and he were?

A. Yes, sir.

Q. Do you undertake to say that he said that if your mother would give him away for intimacy with you? Did he ask you whether your mother would give him away for his intimacy with you?

A. Didn't say what, sir; he simply said that.

Q. Didn't say what for?

A. No, sir.

Q. He was intimate with you?

A. Yes, sir.

Q. And with her?

A. Yes, sir.

Q. You and she each knew the other's secrets as well as her own?

A. Yes, sir.

COURT. Is not that fact pretty well established both in the direct and in the cross-examination? I do not wish to limit, but it seems to me that the details are sufficiently covered.

Q. How long did he stay with you that night?

A. Until about one o'clock.

Q. Did you go to bed together?

A. No, sir.

Q. Where did you stay?

A. Underneath the basement there, sir; on that step.

Q. Had intercourse with him there?

A. Sir?

Q. Had intercourse with him there?

A. Yes, sir.

Q. Several times.

A. Yes, sir.

Q. Where did he say he was going when he left you?

A. Which night, sir?

Q. I am talking of one night only; that is the 15th of March?

116 A. That night he said he was going to Kansas City.

Q. Did he state at any time prior to that, that after he left you in the night that he was going to his own home?

A. No, sir.

Q. Told you he was going to Kansas City?

A. Yes, sir.

Q. Is it not a fact that you had exacted from him a promise that he would not go back to his wife?

A. No, sir.

Q. Is it not a fact that he made you such a promise?

A. No, sir.

Q. What else, if anything, was said by him to you, or by you to him, on the 15th of March, about your mother, besides what you have already related?

A. As I said, what Benson said was, that if my mother gave him away that he would put a bullet through her head and would do it so cold that he would not take a second thought. Then Benson said my mother was going away to New York and I should take that money, which was my brother's money, and he said to me: "Swear to me that you will not speak of it;" which I did—swore that I would not speak of it until such time as I would be compelled to.

Q. And you took an oath that you would not speak of it?

A. Yes, sir; raised my hand and said that I would swear that I would not speak of it. I said to Benson that he would get me into trouble; that he would bring me before the court, meaning in regard to this matter. He said that if I should take it and would swear that I should not speak of it, that he would see that my mother would not come back to make trouble for me. He didn't say where she was going to, any more than going to New York. He then said to me that I was to go to Kansas City and live with him that next week or second week, as soon as I could get ready to go, which the agreement was made long before, that I was to go and live with him, keep house and be his wife.

Q. I was only just trying to get what was said that night. You agreed that you would not tell about the money, and you agreed that you would go to Kansas City and live with him?

A. Yes, sir.

Q. After he had told you that your mother was going to New York?

A. Yes, sir.

Q. And that if she gave him away he would put a bullet through her her head?

A. Yes, sir.

Q. And you expected to go to Kansas City?

A. Yes, sir.

A. And take your brother's money to use for your benefit and his?

A. Yes, sir; and that my brother was to meet with this accident.

Q. I didn't ask you that.

A. That is what Benson said that evening.

Q. He made arrangements with you upon that night to come back again the next Saturday night?

A. Yes, sir.
Q. He kept the appointment?
A. Yes, sir.
Q. And you kept yours?
A. Yes, sir.
Q. Are you afraid of him?
A. Yes, sir.
Q. And your father was in the house?
A. Yes, sir.
Q. Your mother?
A. Yes, sir.
Q. Your brother home every day?
A. Yes, sir; during the day.
Q. You were within fifteen or twenty minutes of police headquarters of this city, were you not?
A. Yes, sir.
Q. You understood that there were officers of the law?
A. No, sir.
Q. Didn't you know that persons in danger could exact protection through the law?
A. I knew nothing of the law or officers; in that particular as to officers or law I know nothing; I am ignorant.
Q. Benson undertook to tell you something about legal rights, didn't he?
A. No, sir.
Q. Didn't he tell you when your brother met with an accident that your father would get the insurance?
A. Yes, sir.
Q. And when your father died you would get all he possessed?
A. Yes, sir.
Q. You believed that?
A. Yes, sir.
Q. You believed there was something to come to you by the death of your mother and the death of your father?
A. Sir?
Q. You knew then, from what he said to you, if you believed him, that upon the death of your mother, followed by the accident to your brother, and the subsequent death of your father, that you would be benefitted?
117 A. I didn't understand that altogether, sir.
Q. He told you as I stated—he told you that after your father's death that you would come into the possession of what your father owned?
A. Yes, sir.
Q. And you, with that knowledge and these statements of yours, intended to carry out the agreement and live with him as his wife?
A. Yes, sir.
Q. You said, I think, when your mother introduced you to him she told you that he had prophecied that when you went to Illinois where your husband was that he would not live a great while and would meet with an accident?

A. Yes, sir.

Q. And that you understood that he undertook to tell fortunes and prophesy things?

A. Yes, sir.

Q. And you say your mother was a fortune teller, or pretended to be?

A. Yes, sir.

Q. Well, on the 22d of March you say he kept his word and came back?

A. Yes, sir.

Q. Did you meet him at the same back gate?

A. Yes, sir.

Q. And admitted him as before?

A. Yes, sir.

Q. And he walked up to the house?

A. Yes, sir; to the basement.

Q. And you and he had your evening visits, as usual?

A. Yes, sir.

Q. How long did he stay there then?

A. Staid until nearly one o'clock.

Q. Did you go to bed?

A. No, sir.

Q. Remained down in the basement?

A. Yes, sir.

Q. Have intercourse with him?

A. Yes, sir.

Q. When he first came there what was his first talk to you that night?

A. Benson came in the back gate the same as usual, saying good evening; I said good evening; he asked where is father; I told him father was in bed; he said where is mother; I said she is in the house; I said she wants to see you; he said: "Wants to see Benson?" Benson said al' right; call her out; so I went up to the house and called mother out and told her that Benson was down there; she said al' right, and she went down and talked with him; I went in the house and staid in there until my mother came in; when she came in I went out and talked with Benson.

Q. In order that there may be no mistake, if I understood you before to say that he asked you on that night of the 22d, as well as the 15th, that he wanted to see your mother? You now say that you told him that your mother wanted to see him?

A. On the night of the 15th he asked to see mother, and on the night of the 22d he asked where mother was, and I told him she was in the house and that she wanted to see him.

Q. Now, on the 22d the interview between your mother and Benson was caused by her previous statement to you that she wanted to see him?

A. Yes, sir.

Q. And she did go out and talk with him, as you understood?

A. Yes, sir.

Q. Did you learn from her or from Benson either what that talk was about?

A. No, sir; not one word.

Q. And he staid with you on that Saturday night until about one o'clock Sunday morning?

A. Yes, sir.

Q. And then told you he was going where?

Q. When Benson left I asked him where he was going. A. He said he was going up on the reservation and try and meet the train on the other side of the bridge, so as he would get home early to Kansas City.

Q. You don't know whether he went that way or not?

A. No, sir, I do not; I did not follow him to see.

Q. So you don't know whether he went from your house to his own house where his wife was?

A. No, sir, I do not.

Q. When did you next see him?

A. I didn't see him any more until Monday night, some time after eight and before ten.

Q. Saw him at the same place at the back gate?

A. Yes, sir; no, sir; not at the back gate.

Q. You said you saw him coming up the walk?

A. I did not; he came in the back gate, but I didn't see him there; I met him on the walk, and walked with him to the back gate.

118 Q. Why didn't he stay there that night later than ten o'clock?

A. He didn't stay until ten o'clock, sir.

Q. You say between eight and ten?

A. After eight and before ten.

Q. Tell us what time it was?

A. Sir?

Q. What hour was it?

A. After eight and before ten; I can not tell the exact time; I know it was after eight and I know I was in the house when the clock struck ten, and that time that Benson was there I did not keep the time, and only remember the words he said to me.

Q. That was Monday night?

A. Yes, sir.

Q. You say that you said to him—I will get you to tell it. What did you say to him?

A. I said to Benson that my mother had left Sunday evening shortly after five and had not returned yet, and asked him if he knew where she was, if he could tell me. I said to Benson that mother had left Sunday evening shortly after five o'clock and had not returned, did he know or could he tell me where she was or had he heard of her? Mother left Sunday evening shortly after five o'clock and we haven't heard or seen her since, and have you seen or heard of her since?

Q. Where did you learn that?

A. You said you wanted what he said; I said it to him in German.

Q. Have you not heard that story written down and committed it to memory?

A. A. No, sir.

Q. Not at all?

A. No, sir.

Q. Nobody wrote anything for you to commit to memory?

A. No, sir; Benson said to me: "How did he know where my mother was; was he my mother's keeper?"

Q. I didn't ask for what he said.

COURT. You asked for the conversation.

Q. What had you done that day, if anything, to ascertain where your mother was?

A. I did nothing, sir.

Q. You say you sat up a great deal that night?

A. Yes, sir.

Q. And then your father got up in the morning and you and he talked of your mother's absence and he went to work?

A. Yes, sir.

Q. And when your brother came home you told him and he went to work as usual??

A. Yes, sir.

Q. And you remained at home until your father returned at night?

A. Yes, sir.

Q. And then remained there until Benson came and then you asked Benson about your mother?

A. Yes, sir.

Q. When your father got up in the morning I think you told him that your mother had not been at home during the night?

A. Yes, sir.

Q. And what was his remark?

A. He guessed she had staid somewhere all night and that she would be home after a while.

Q. Did you tell him what Benson said, that she was going to New York?

A. No, sir.

Q. Did you tell your father at all that your brother might likely meet with an accident and that he would get the insurance money?

A. No, sir.

Q. Now, did you write Benson a letter on either Sunday or Monday night to come up and see you?

A. No, sir.

Q. Were you not in the habit of writing him letters?

A. Yes, sir.

Q. In German or English?

A. In German; he can not read English to my knowledge.

Q. Didn't you write letters to him, dating your letters at Bloomington, Illinois?

A. Yes, sir; that is the way I dated them.

Q. And you mailed them here?

A. Yes, sir; Burlington, Illinois, is the right name.

Q. I want you to look at that paper and say whether that is in your handwriting or not and the whole of it?

A. Yes, sir; that is my handwriting.

119 Q.3 And all of them? Those three or four letters?

A. Yes, sir.

Q. And what name is signed to it, if any?

A. There is no name signed.

Q. To whom did you write them?

A. Benson.

Q. It is dated Burlington, Ill., and is written in Leavenworth?

A. Yes, sir.

Q. I will ask you if that [indicating] envelope is in your handwriting and directed to Richard Waldo, at Kansas City, and mailed by you at Leavenworth?

A. Yes, sir.

Q. After he left your house Sunday night did not you write him to come back to your house Monday night that you wanted to see him?

A. No, sir.

Q. Didn't you write him this in substance: "Dear Richard: Please come home to-night or to-morrow, Monday or Tuesday; I want to see you."

Mr. ADY. I object unless Mr. Webb submits the paper to her to see whether it is in her handwriting.

Mr. WEBB. This is not her handwriting.

COURT. The question will not be answered. If you have the letter submit the letter.

Q. He came on Monday night and you were expecting him?

A. Yes, sir; I expected him, as he told me he would be Monday or Tuesday.

Q. What for?

A. What for, sir? For a bundle of articles that was there.

Q. For what purpose?

A. To keep house with; for I had more things than I could put in my trunk; he was to take them before; that is what he was to come for Monday or Tuesday night; he told me he was coming.

Q. Didn't he want to stay later than he did that Monday night?

A. He didn't want to stay at all, sir; he told me to get that money for him immediately; that I could not get it quick enough for him to get away.

Q. You got the money?

A. Yes, sir.

Q. You said you were afraid of him?

A. Yes, sir; and that is why I did it.

Q. And your mother was then absent and missing?

A. Yes, sir.

Q. And you gave him the money?

A. Yes, sir.

Q. You did not tell your father that you had given him the money?

A. No, sir.

Q. Did your father or brother make search for your mother or hunt up the officers?

A. No, sir.

Q. And remained until your mother's body was found in the river and brought home?

A. Yes, sir.

Q. You say your mother was in good health and spirits when she left Sunday night?

A. Yes, sir.

Q. And that you were looking out of the window and saw her going along the street?

A. Yes, sir.

Q. Didn't you purposely look out of the window to see where she was going?

A. No, sir; I was looking out of the window when mother came up out of the back yard, and when she passed I said I must go and see where the children are, and the last words she said were: "They are all down in the stable," and I still remained looking out of the window; I just rested there to see what was going on.

Q. Which way did she go?

A. East on Dacota street.

Q. You say that your children had made trouble for your mother?

A. Yes, sir; she didn't want to be bothered.

Q. And you made arrangements to go to Kansas City and take your children and live with Benson?

A. Yes, sir.

Q. And in order to do that took your brother's money and gave him the money?

A. After him telling me to take it I took it; yes, sir.

Q. Didn't you take that money before he came back on Monday night and demanded it?

A. Yes, sir; I took it and placed it in a different place.

Q. Took it from under the bed and put it in a bureau drawer?

A. Yes, sir.

Q. Ready to give it to Benson when he came Monday night?

A. No, sir.

Q. Was it any safer in the drawer than in the bed?

COURT. It is not material; you need not answer that cross-examination.

120 Q. When counsel for the Government was asking you some questions, I didn't hear what you said, and I want you to state it without further suggestions—and when you told him that your mother had left he held his hat up and you said something about something wrapped around his head?

A. That is what I supposed it to be, a cloth, which I judged was the muffler from the way he had it. It was something longer than a handkerchief, and when he raised his hat I could see that it had been wrapped around his head twice, and I thought I could see it was something like a muffler. If I could not have seen, I would not have said so.

Q. I want a full description?

A. It was a cotton piece of cloth.

Q. When was that you saw that?

A. Well, Benson stood between the back gate and the house.

Q. And before you got the money?

A. Yes, sir.

Q. How far was he from the door into which you went to go into the house?

A. Well, the length of three rooms.

Q. You left him and went into the house?

A. Yes, sir.

Q. Your father was in the house, and the money was there?

A. Yes, sir.

Q. I want to know why you didn't tell your father that Benson was there under such circumstances that you were afraid of your life, instead of taking the money?

A. Because my father knew nothing of my being intimate with him, and I had agreed to take that money, and Benson wanted me to take it, and because I was afraid that he would get me into trouble.

Q. And you regarded your oath to Benson to take that money more than you did to tell your father?

A. Yes, sir.

Q. Did you say that you gave him the money and he kissed you good night?

A. Yes, sir.

Q. And you kissed him good night?

A. Yes, sir; when he kissed me.

Q. You were afraid of him, and got the money and gave it to him?

A. Yes, sir.

Q. And then returned to him?

A. He kissed me good night.

Q. And you returned it?

A. He kissed me on the lips; yes, sir. I will not lie about anything; I have told my disgrace and my ruination.

Q. You say when you were asked why you were afraid of him, what was your answer; I want you to tell me?

A. Because Benson had threatened me so by telling me that he had something to tell me, and when he told me that I was the twelfth woman he had, and unless I would do as he told me that he would send me to hell the same as he did the other eleven, and before that he threatened me.

Q. That was in Kansas City?

A. Yes, sir.

Q. And after your visit was over you returned home where your father, and mother, and brother were?

A. Yes, sir.

Q. Away from him and out of his reach?

A. Yes, sir.

Q. And didn't make any effort to protect yourself against him?

A. No, sir.

Q. But after that received his nightly visits of lust and love?

A. Yes, sir.

COURT. I am going to draw the line. That whole question has been gone over several times; the facts are admitted.

Mr. WEBB. I know, your honor, that is all true; but with this witness I thought I had a latitude.

Q. About that muffler—you say that the officers, Mr. Murphy and Doane, showed you a muffler?

A. I didn't say Murphy, sir; Mr. Doane and Mr. Tracy Mace, I think, is the name.

Q. Mr. Doane showed you the muffler?

A. Yes, sir.

Q. And also asked about that muffler?

A. Yes, sir.

Q. You said you had seen a muffler in Benson's valise at Kansas City?

A. Yes, sir.

Q. Did you pick that muffler up and look at it?

A. I had it in my hands; I didn't pull it out to see whether it was square.

Q. You didn't take and open it?

A. No, sir.

121 Q. It was folded when you saw it?

A. Yes, sir; it was folded up.

Q. You didn't see its size and shape?

A. No, sir.

Q. I will ask you if the muffler that Mr. Doane showed you was the muffler you had seen at Kansas City?

A. That I can not say.

Q. You were shown a couple of false mustaches?

A. Yes, sir.

Q. You said Benson told you he wore them on what occasions?

A. He told me he wore them at plays, such as they cell the black art, or magicians, or some kind of play.

Q. In which he was a kind of conjuror or sleight-of-hand performer?

A. Yes, sir.

Q. That is the purposes he used the mustaches for?

A. Yes, sir.

Q. You say he had three revolvers?

A. Yes, sir.

Q. And a sabre?

A. Yes, sir.

Q. What did he tell you he kept them for?

A. I asked him what he intended with all these, and he said that he intended to use them some day.

Q. Did he tell you in what way?

A. No, sir.

Q. Is it not a fact to your knowledge that he is a machinest?

A. That is what he says.

Q. Don't you know that he handles guns and implements of machinery?

A. No, sir; I do not know.

Q. You have known a good deal about him and his business affairs?

A. Only from what he said.

Q. Mrs. Rautzahn, you already gave testimony that you were jointly indicted with Benson for the same offence charged against him?

A. Yes, sir.

Q. I ask you whether you have been promised at any time by anybody, by Mr. Ady or Atwood, or anybody else, that if you would testify in this case against Benson that you yourself should receive leniency or be discharged?

A. No, sir; received no promise of any kind.

Q. I wish you to describe the inside of your father's house, where you lived, as it existed in March, last year; as you come in from the front gate and in the door which is on the east side, what room do you enter there?

A. The bedroom, sir.

Q. There is a bedroom on that floor?

A. Yes, sir.

Q. How large is that bedroom?

A. It is supposed to be about 14 feet by 12, as near as I can tell.

Q. What other rooms on that same floor?

A. There is a room north of that, and a room south of that, and there is a kitchen south of that, supposed to be a summer kitchen.

Q. The outside door leads directly into the bedroom?

A. Yes, sir.

Q. From the east; and the sitting room north of that?

A. Yes, sir.

Q. Is there a side room that leads into the basement from that floor?

A. From the bedroom; no, sir.

Q. From any of the rooms on that floor?

A. Yes, sir.

Q. In what room?

A. In the kitchen, sir.

Q. The basement, or cellar—is that under the whole house?

A. No, sir; just under one room; supposed to be under the kitchen.

Q. That room extends from the north wall of the building—how far south?

A. I don't understand that?

Q. The basement was originally excavated the whole side of the house, was it not?

A. No, sir.

Q. Then tell us the size of the cellar?

A. The cellar is just the size of one room.

Q. Is there stairs going down from the room?

A. Yes, sir.

Q. From which corner of the room?

A. Northwest corner.

Q. Is there a door from that cellar which leads out after going up stairs?

A. Yes, sir.

Q. Where is that?

A. Facing south, sir.

Q. Then there is a room there that has walls on the east and the
122 west; there is a partition between that and the cellar on the north and the steps are upon the south part, is it not?

A. Yes, sir.

Q. Is there any floor in that cellar?

A. No, sir; nothing but the ground.

Q. Is there any floor in the basement part south of the cellar?

A. No, sir.

Q. Your father at that time kept a horse, didn't he?

A. Yes, sir.

Q. Where did he keep the horse?

A. In the stable.

Q. Can you describe that horse?

Mr. ADY. I object to that; I don't think it is necessary to cross-examine the witness about that.

COURT. Is it material to know the color of the horse? You can describe it.

A. It is supposed to be a bald face, partly bald face, and something was the matter with one of the horse's eyes; the color I can not tell, whether yellow or bay; something like that.

Q. Your father had that horse there for a long time?
A. Yes, sir.
Q. You stated Saturday that you had been in custody since the 22d of April?
A. Yes, sir.
Q. I will ask you if you were not arrested prior to the 22d of April?
A. It was on the 22d of April that I was rearrested.
Q. You answer the question I asked you. Were you not arrested before the 22d of April?
A. Yes, sir.
Q. How many times?
A. Once, sir.
Q. Who arrested you?
A. Mr. Murphy and Mr. McFarland.
Q. Do you know Mr. Doane, who was at that time chief of police?
A. Yes, sir.
Q. Didn't he arrest you, or cause you to be arrested once?
A. Yes, sir.
Q. I will ask you if while you were in jail on one of these arrests, if your father came to the jail and you had a talk with him there?
A. Yes, sir.
Q. On more than one occasion?
A. Yes, sir.
Q. Was there any talk there between you and him about that horse?
A. No, sir.
Q. Now, Mrs. Rautzahn, is it not true that you said in jail, and in talking with your father, and in the presence of James Doane and others, that he, your father, need not be afraid of any blood on the horse, because the blood came from some beef or meat?
COURT. You need not answer that question; I can not see how that can affect the case; it is not cross-examination.
Mr. WEBB. She is giving testimony against this defendant——
COURT. It is not cross-examination in any sense of the word; her trial is yet to follow.
Q. You said that when your mother was brought home she was brought in a shroud?
A. Yes, sir.
Q. I will ask you if you saw either that time, or at any other time after your mother was brought home, the garments, or any of them, which she wore when she left the house?
A. No, sir.
Q. Were you present at the coroner's inquest?
A. Yes, sir.
Q. I will ask you if there was a saw of any kind taken from your house that belonged to your father or mother there at the coroner's inquest?
A. There was a saw taken from the house.
Q. What kind of a saw was that?
A. Supposed to be a carpenters' handsaw.
Q. I will ask you if at that time there was any other saw to your knowledge, in the house, belonging to your folks?
A. Yes, sir; a common wood saw.

Q. I will ask you if there was a revolver or pistol there at the coroner's inquest that belonged to your father or brother?

A. I didn't see them there; they were taken from the house; one belonged to my brother and one to my father, but I didn't see them.

Q. Your father and brother each had a revolver at the time?

A. Yes, sir.

Q. Can you tell what size they were?

A. My brother's was a small size, about that [indicating] size; and father's, as near as I can say, was about that [indicating] size; my
123 father's was dark colored and no nickel about it; my brother's was nickel covered.

Q. You said you were present at the coroner's inquest. I will ask you if you testified there as a witness?

A. Yes, sir.

Q. Do you remember whether you gave any testimony there concerning any money that belonged to your brother or mother or yourself?

A. Yes, sir.

Q. What did you testify about that at the coroner's inquest?

A. I testified there that the money that was taken from the house disappeared with my mother.

Q. I will ask you if you did not testify there that your mother took the money away with her on her person when she went away from home?

A. No, sir.

Q. Then possibly I misunderstood your other answer.

Q. Do you know James Doane?

A. Yes, sir.

Q. I will ask you if you have known him prior to the disappearance of your mother?

A. Yes, sir.

Q. I will ask you if you did not have several conversations with him about your mother's disappearance prior to your arrest?

A. Yes, sir.

Q. Did not you tell Mr. Doane that what money there was that your mother took it away with her on her person; that she had it rolled up and carried it away in her clothes?

A. No, sir.

Q. Did you talk with Mr. Doane at all about the number of persons that were frequenting or coming to your father's house prior to your mother's disappearance?

A. Yes, sir.

Q. He was at that time chief of police, was he not?

A. Yes, sir.

Q. Seeking information from you?

A. Yes, sir.

Q. I will ask you if you didn't tell him in one of those conversations, that no one was in the habit of coming to your father's house; that you were a widow and living alone with your children and father and mother, and didn't see any one, scarcely?

COURT. You need not answer the question. Fix the time and place of the conversation, otherwise it will be very unfair to ask such a question.

Q. I will have to do that by another question. Your mother was brought home on Friday, the 29th of March?

A. I think it was Friday; yes, sir.

Q. And the funeral took place on the following Sunday?

A. Yes, sir.

Q. Now, with reference to that time; when were you first arrested by Doane?

A. The Saturday evening before Easter Sunday.

Q. Before the funeral?

A. No, sir; the Saturday before Easter.

Q. I will ask you if at that time Mr. Doane was making inquiries in regard to persons who were visiting the house and in conversation with him you told him that no persons visited the house except neighbors, and in that conversation you told him you were a widow living alone with your parents and didn't see anybody?

A. I don't know, sir, as I told Mr. Doane that; I don't remember it.

Q. Let me ask you as a matter of recollection, if you do remember that Mr. Benson's name, this defendant's name, was not mentioned in connection with the homicide or death of your mother for a couple of weeks or more after the body was found?

A. No, sir.

Q. Directly after his name was mentioned did you have a conversation with Mr. Doane?

A. Yes, sir.

Q. I will ask you if in that conversation you didn't tell Mr. Doane that Mr. Benson didn't visit your house oftener than once a year, and that you had not seen him since December last?

A. I don't remember telling him.

Q. I will ask you if you told him that at any other time or place?

COURT. That you need not answer. I presume the cross-examination is for the purpose of impeachment and she is entitled to the time and place.

Q. I asked you about writing some letters on Saturday. Now, I will ask you if you didn't write Mr. Benson frequently while he was in Kansas City in the months from the first of January up to the last of March?

A. I wrote to Mr. Benson January and February, and late in March; I don't remember when the last letter was written.

124 Q. I showed you a letter in an envelope on Saturday which I forgot to have the stenographer identify. For that purpose, I will show you the same papers, so that you can see that they are the same, and then I will have the stenographer identify them. That is the letter you stated you wrote to Mr. Benson on Saturday?

A. Yes, sir.

COURT. Is that in your handwriting?

A. Yes, sir.

Q. Intended to reach Mr. Benson on Saturday, was it?

Q. Yes, sir.

(Exhibits 7 and 8 shown witness.)

Q. I did ask you Saturday if you didn't write a letter Sunday or Monday to Benson, requesting him to come and see you Monday and Tuesday, and you made an answer, and I don't care to repeat either question or an-

swer. I will ask you if you didn't write to him twice between Monday, the 24th, and Saturday, the 30th of March, directing your letters to Richard Waldo, Kansas City, Station A, Box 43?

A. I know that I wrote him one letter; I remember writing him one letter.

Q. Between those dates?

A. Yes, sir; but I don't remember any further letters.

Q. Did you get any letter from him between those dates?

A. Yes, sir.

Q. What time did you get that letter?

A. On the day of the inquest, sir.

Q. What did you do with that letter?

A. I tried to read it, sir, and as I could not I put it in my pocket and kept it for awhile.

Q. What did you do with it?

A. I burned it after that.

Q. I will ask you if you did not burn it the day of the coroner's inquest?

A. No, sir.

Q. Let me ask you again in regard to Mr. Doane questioning you, for the purpose of fixing the time and place. I will ask you if, before you were arrested, upon one occasion he came to your father's house?

A. Yes, sir.

Q. Took you into a room by yourself and had a conversation with you, and making some statements about your father to you. Do you remember such an occasion?

A. Yes, sir; but I was not alone with him.

Q. I will ask you if he did that at one time when you and he were alone?

A. No, sir.

Q. Who were present besides yourself and Mr. Doane?

A. The man I don't know, but there was some one in the room standing by the side of Mr. Doane and I.

Q. Did Mr. Doane ever take you into a room and talk with you there when there was no one else present?

A. Yes, sir.

Q. Did he do that more than once?

A. Yes, sir.

Q. How many times?

A. Twice, to my knowledge, now.

Q. Was that before you were arrested, or afterward?

A. After I had been arrested the first time, sir.

Q. I will ask you if he took you into a room just before your arrest the first time, and there talked with you alone, making at that time to you some statements that he said your father had made to him?

A. Not that I know of, sir.

Q. I will ask you if that didn't take place, and at that time you didn't tell him that Benson, this defendant here, referring to him, was only a distant friend, and that he had not been at your house since Christmas or December?

Q. Not before I was arrested, I made no such statement to Mr. Doane.

Q. After your arrest, then?
A. Not exactly like that, either.
Q. What did you say to him?
COURT. When and where, ask her that?
Q. Mr. WEBB. I believe that I have no other cross-examination, except as to her testimony generally in regard to examination before coroner's inquest. I made application to the county attorney for a copy of that and he says it was reported, and since I came into court this morning I learned who the stenographer was, and we have a subpœna duces tecum. She said she would make a copy. As soon as I can get it I desire to ask this witness some questions.
COURT. She may be recalled, but the cross-examination will be limited.

125 A. W. BREWSTER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Questions by Mr. ADY:
Q. Your name is A. W. Brewster?
A. Yes, sir.
Q. Where do you reside?
A. Doniphan County, Kansas.
Q. Were you a member of the Federal grand jury in October last here?
A. Yes, sir.
Q. Did you keep the notes of evidence before the jury?
A. Yes, sir; I was the clerk of the jury.
Q. Do you know Mr. Benson?
A. I know him as he appeared there, sir.
Q. Did you hear him make a statement concerning this case before the grand jury?
A. Yes, sir.
Q. You may state, if you know, whether he was required to appear there, or what he said about appearing voluntarily before the jury before testifying.
A. I remember when he came into the room he was informed by the assistant district attorney, I think it was, or yourself—I am very sure it was Mr. Soper—that he understood that he wished to make a statement to the grand jury, and that he should do so or not, as he saw fit.
Q. What did Benson reply to that?
A. He said that he wanted to make some statement.
Q. What further did he say about the statement he desired to make?
A. I remember that he asked particularly if he would be permitted to tell the truth and all of it.
Q. What was said to him in regard to that?
A. He was told that that was what he would be permitted to do.
Q. Was he put on oath?
A. No, sir.
Q. Did he make the statement?
A. Yes, sir.
Q. You may state, if you remember, what he said about where he was on Saturday evening previous to this murder.

Mr. WEBB. Wait a moment. This testimony was written down, and we would rather it be produced.

Q. Was it written down or a memorandum made of it?

A. I simply wrote it down as the points struck me. I was not fast enough to write it all, and I simply took that which was most important to me.

Mr. ADY. Mr. Brewster would like to use this if there is no objection.

COURT. There is no objection for the purpose of refreshing his recollection. I desire that you proceed with the examination and let the witness use the notes for the purpose of refreshing his recollection.

Q. Do you remember what he said about where he was on Saturday night previous to the murder?

A. It was the 22d of March. I remember that he said that on the 22d of March he was at the Mettman house.

Q. Do you remember what time he said he arrived there?

A. No, sir; I did not make a note.

Q. Do you remember to what hour he said he staid?

A. No, sir; I remember though, but not from my notes; but I remember from his statement that he came there after dark.

Q. Do you remember to what hour he said he staid; how late?

A. It was rather late in the night; that is, he was there quite awhile.

Q. Do you remember what he said, if anything, about having an interview with Mrs. Mettman that evening?

A. Yes, sir; he said that when he first got there that he had an interview first with Mrs. Rautzahn, or Mary, as he said, and she told him that Mrs. Rautzahn wanted to see him.

Q. What did he say about seeing her?

A. That he had an interview with her; that she came out shortly afterwards and he had a conversation with her.

Q. Where did he say he went after he left the Mettman house that evening or night?

A. That he went back to Kansas City.

Q. Is that his statement?

A. I haven't it here.

Q. That is your recollection?

A. Yes, sir; that is my recollection, that he said he went to Kansas City.

Q. Do you remember where he said he was on Sunday?

A. No, sir.

Q. Do you remember where he said he was on Monday, the 24th?

126 A. I remember that he said he was in Kansas City on Monday; he claimed to have been in Kansas City on Monday and there visited a dentist, and at that time he received a letter from Mary asking him to come here.

Q. Did he state where the dentist's was; the dentist's office?

A. No, sir; I don't think he did; if so, I didn't take it down.

Q. Do you remember whether or not he went into the office and whether or not work was done for him?

Q. He said he went in and had two teeth pulled and paid a dollar.

Q. Did he state who the dentist was?

A. He may have, but I don't know.

Q. Where did he say he went from the dentist's office?

A. Immediately from there?

Q. Yes, sir.

A. I don't know.

Q. What statement, if any, did he make about receiving a letter?

A. He made a statement that he received a letter from Mrs. Rautzahn asking him to come to Leavenworth.

Q. Was he there in Kansas City the rest of the day?

A. I don't remember.

Q. Do you remember that he said he did anything?

A. No, sir.

Q. What did he say he did that evening?

A. Said he came home to Leavenworth.

Q. And where did he go to at Leavenworth; did he state?

A. All that I can remember is that he went to the Mettman house that night.

COURT. What night do you refer to?

A. Monday night.

Q. Who did he say he met there and what transpired?

A. I remember that he said that he went to the Mettman house and there met Mary, and that he had been drunk and was full of fun, and that she was like ice.

Q. What did he state took place between him and Mary?

A. He said she said she was sick, and that mother had disappeared Sunday night, and asked him where she was, and he told her not to bother herself about that.

Q. What else?

A. The next I can remember is that Mrs. Rautzahn went back into the house and left him out there some time; he was, I believe, sitting out on an embankment around the house, and she stayed so long that he fell asleep and I think she woke him up.

Q. Go ahead.

A. No; I am wrong there. She went into the house and told him to be quiet; that he would wake father up; that was when they were in the basement, and afterwards they went out of the basement and he was on the outside of the house and she went in the house again, and she came out and woke him up and handed him a rag or cloth in which something was wrapped up and told him to put it in his pocket, and he asked her why she had stayed so long.

Q. Did he tell what this was in the rag?

A. He did later on in his story.

Q. What did he say it was?

A. He said he put in his pocket and didn't know what it was until he got to Kansas City, and there he unwrapped it and found there was four hundred and forty dollars.

Cross-examination:

Questions by Mr. WEBB:

Q. Mr. Brewester, how long was Benson telling his story before the grand jury?

A. I should think he was probably two or three hours; maybe not three hours; perhaps two; maybe not more than an hour and a half.

Q. You made some notes of the testimony?

A. Yes, sir.

Q. And how many pages are there of your notes of his testimony?

A. There are just these two; that page and this.

Q. You have not undertaken to tell the whole of his statement to the grand jury?

A. No, sir; not fully.

Q. You say when he told you of his visit to the Mettman house on the night of the 22d of March that he there met Mary, that is Mrs. Rautzahn, and she told him that her mother wanted to see him, and her mother came out to him and had an interview?

A. Yes, sir.

127 Q. I don't ask you what he said, but I ask you if he did tell you what that interview was about?

A. No, sir.

Q. He didn't state what she said to him?

A. Yes, sir; I can tell you some things; I can tell you what he said that I have; I remember just one thing that he said; I don't remember whether he stated about the conversation, but I remember he said he gave Mrs. Mettman some money and candy to give to the children, or for the children; the candy was for the children, but I don't know what the money was for.

Q. Did he tell what Mrs. Mettman wanted to see him about?

A. I don't think that he did; if he did it did not make any impression upon my mind.

Q. You say that he then went back to Kansas City?

A. Yes, sir.

Q. Did he tell you what hour of the day or night he went back to Kansas City? How soon after he left the Mettman house?

A. No, sir; he may have, but I don't remember.

Q. Is it not a fact that he said he went from there to his own house?

A. He might have said so.

Q. And staid there all day Sunday? Don't you remember that he said he staid there at home all day Sunday and went back to Kansas City Sunday night?

A. No, sir; I don't remember.

Q. You say that he did say that he was in Kansas City on Monday and went to the dentists?

A. Yes, sir.

Q. You say he said he went to the dentists and had two teeth pulled?

A. Yes, sir.

Q. Is this not what he said: That he had the toothache and he went from his room to the dentists for the purpose of having two teeth pulled?

A. No, sir; don't think he did; that is not my recollection; I can find my notes here.

Q. Read my notes then. See what it says.

A. I won't say about two teeth, but it was something to that effect, I think. Here are my notes. I can not tell what they mean myself. It was about two o'clock, or half past two, had two teeth pulled and gave a dollar.

Q. I ask you if he didn't say that the place where he went was the place where he went to the dentists, and he had previously had teeth pulled and paid for them?

A. That is not my understanding.

Q. You say he said he received a letter from Mrs. Rautzahn?

A. Yes, sir.

Q. Did he say what time of the day he received the letter?

A. No, sir; but I think it was after the teeth were pulled.

Q. Did he say anything about getting ready to go to work in the afternoon?

A. I don't remember.

Q. Didn't he state that after visiting the dentist's then he went somewhere and had some fun with the boys, and then put on his work clothes for the purpose of going to work after dinner, and that on his way he passed the post-office where he had a post-office box, and found a letter from Mary, and then he thought he would not go to work that day?

A. He might have. There were a great many things said, and I don't know what he might have said outside there; I don't know where he got the letter; simply that he had got a letter from Mary and asking him to come home.

Q. Did he say he came?

A. Yes, sir.

Q. And pursuant to that letter?

A. I suppose so; yes, sir.

Q. You say that he said when he had reached the Mettman house that he had been drunk, and saw Mary and said he was full of fun, and how did he say Mary received him?

A. She was like ice.

Q. Do you remember what he said then as to the conversation that took place between himself and Mary?

A. I remember those things that I stated in the direct examination. I remember that he said that Mary said that mother left last Sunday, and asked where was she, and he told her not to bother herself, and then that she went in the house and came back and told him to be quiet; that father would not sleep; and I remember that he said that she was very much afraid he would wake father, and then he went outside and went to sleep.

Q. Did he state that this conversation took place in the basement or out doors? Where did he say the conversation took place? Outside or indoors?

128 A. I should judge in the basement; that is my recollection.

Q. You say that he did say that he went out of the basement and that he sat down and went to sleep and slept until she came and woke him up?

A. Yes, sir.

Q. And handed him a rag?

A. Yes, sir.

Q. Did he tell what conversation took place at the time she handed him that rag?

A. He said that she told him to keep it and put it in his pocket, and he asked her then why she staid so long in the house before she came out.

Q. What was her answer to that as he gave it?

A. I don't know whether he gave that or not; I don't remember.

Q. Didn't he say that he wanted her to admit him into the house and let him stay, as he had been accustomed to stay there?

A. I don't know.

Q. Don't you remember that he did and that she said that her father was asleep and that he must not stay, and she could not admit him?

A. I don't remember whether he said that or not.

Q. He did say, however, that he didn't know what was in that rag, but he put it in his pocket?

A. I don't know as he said he didn't know what it was; but he made that impression, anyway, with me, that he didn't know what it was until he opened it.

Q. Did he say that he returned then to Kansas City that same night?

A. Yes, sir; I think I did.

Q. And after he reached Kansas City he opened that rag and found $440 in gold or money, which was it?

A. It was $440.

Q. And that night, according to his statement, was Monday night, the 24th of March, was it?

A. Yes, sir.

Redirect examination:

Questions by Mr. ADY.

Q. Do you remember whether or not Mr. Benson made any statement about what he was going to do with the money?

A. I remember that he was asked if he kept the money. He said yes; and when asked what he was going to do with it, he said that he had intended to keep it to make a home for him and Mary.

HENRY SCHINDLER, a witness on behalf of the plaintiff, having been recalled, testified as follows:

Questions by Mr. ADY:

Q. Do you remember of Mr. Benson being arrested and brought here to Leavenworth?

A. Yes, sir.

Q. Did you have some conversation with him after his return?

A. I did, sir.

Q. Where at?

A. At the county jail.

Q. You may state how the conversation came to take place. Whether you made him any promises.

A. I went into the cell and represented myself as a newspaper man, and we were talking; I think there were others present.

Q. Was there anybody making the proposition that if he would talk about it that it would go easier with him?

A. No, sir.

Q. Did you speak in German or English?

A. German; he stated that he had criminal relations with both Mrs. Mettman and Mary; that he could go there whenever he wanted to; in fact that he could compel any woman to come to him, if he asked her.

Mr. WEBB. If that is the character of the testimony I will object.

COURT. Mr. Ady, you had an opportunity to go into that whole question before.

Mr. ADY. All I seek to prove is to corroborate the statement of Mary Rautzahn upon that point.

COURT. You may prove admissions to that extent, but I am not going to open up the question again.

Mr. WEBB. I move to strike testimony from the record, and object to anything further.

Mr. ADY. I object to the withdrawal.

COURT. The motion to strike out will be overruled.

129 Q. What, if anything, did he say to you about the money?

A. That he had received it.

Q. What did he say about receiving it and what he did with it?

A. I cannot tell you the words used or that he made any statement to me regarding as to what he did with the money, except that he went to the house and got the money from Mary.

Q. Did he make any statement there about having intimacy with Mrs. Mettman on the night before she was killed?

Mr. WEBB. I object to that.

COURT. Put your question in the other form.

Q. No question?

A. I have no positive recollection on that point.

Q. What, if anything, was said about his giving or paying money to Mrs. Mettman?

A. He told me he had done so.

Q. Did he say what it was for?

A. I don't remember.

Cross-examination:

Questions by Mr. WEBB.

Q. You say you had a conversation with Benson when he was brought back here. When was that?

A. Some time last fall; I think in September.

Q. Was that the first you had seen of him?

A. Yes, sir; to my recollection.

Q. Do you know when he was first accused or charged with being connected with the homicide?

A. It was, I think, about the middle of April, I cannot recall the date. I know that it was Wednesday that he first received the information.

Q. Is it not a fact that both prior to the time that his name was connected with it and afterwar*ds* that you were the correspondent of the Kansas City Times?

A. Yes, sir; I have been so for some years.

Q. And that you were seeking from every source possible all manner of information that would implicate anybody connected with that killing?

A. No more than to ferret out crime.

WILLIAM PICKENS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:

Q. What is your name?

A. W. M. Pickens.

Q. You live where?
A. Leavenworth.
Q. How long have you resided here?
A. About thirteen years.
Q. What is your occupation?
A. I am jailor of Leavenworth County, and deputy sheriff also.
Q. Are you acquainted with Benson?
A. Yes, sir.
Q. Did you have anything to do with his arrest?
A. No, sir; he was arrested when I got to Camden.
Q. Did you go there armed with process to bring him back?
A. Yes, sir.
Q. And you brought him back?
A. Yes, sir.
Q. Where did you find him?
A. I found him in the city hall of Camden, N. J.
Q. You say he was under arrest at that time?
A. Yes, sir.
Q. What, if anything, do you know about a package that had been transmitted by mail, being exhibited to him in your presence?
A. There was a package of jewelry——
Mr. WEBB. Wait a moment.
COURT. State the contents of the package and answer the question.
Q. You say the package was exhibited. Where?
A. In the mayor's office in Camden.
Q. By whom?
A. By the mayor and myself.
Q. You may state whether he didn't make any statement about it in your presence.
A. Yes, sir; I think he did.
Q. Now, at that time had you or anyone else made any suggestion or requested him to make a statement about it?
A. No, sir; I didn't.
Q. Had any one?
A. Not that I heard.
Q. Had any one offered him any immunity for making the statement?
A. No, sir.
Q. In the mayor's office you say it was?
A. Yes, sir.
Q. Describe to the jury the package that was opened there.
130 Q. Have you the package in your possession?
A. No, sir; I turned it over to Mrs. Foster.
Q. Mrs. Alice Foster, the wife of a merchant here?
A. Yes, sir.
Mr. WEBB. Wait a moment. I object to all this; I don't see what it has to do with Benson.
Mr. ADY. I intend to call Mrs. Foster next.
COURT. It is a question of identification to go to the jury.
A. Yes, sir; I turned it over to her.
Q. You may describe the package.
A. It was a small square wooden box, had a kinder dark brown paper around it with an address on it.

Q. What address was on it?
A. Arthur Felton.
Q. What city?
A. Camden, N. J., and gave the number.
Q. Did you see the postmark on it?
A. Don't remember whether I noticed that or not.
Q. Give what was in it.
A. A ladies' gold watch and chain with toothpick; a gold toothpick attached to the chain; the watch had the initials of A. A. F.; there was a twenty dollar gold piece; there was a diamond ring, two of them, I believe; one solitaire diamond, and the other eight or nine diamonds in it; I have got a receipt from Mrs. Foster that I can tell everything that was in it.
COURT. Refresh your recollection from that?
A. One hunting case gold watch, one gold chain, one diamond ring with eight diamonds around an emeral', and one diamond solitaire, and one pearl solitaire, two bracelets, one breastpin and a pair of earrings, one toothpick; four pieces good silver, one pair of good earrings, one amber drop, and two pieces of gold fringe, I believe it is; no, I don't know what it is; and two pieces of something or other (gold fringe), and two chain links; I turned it over to her——
Mr. WEBB. Wait a moment.
Q. Those are the articles in the package?
A. Yes, sir.
Q. What, if anything, did Benson say about the property in the package?
Mr. WEBB. Wait a moment; I object to that as incompetent and immaterial in this case.
COURT. Mr. Ady, is it material in this case?
Mr. ADY. The witness has stated that this package was addressed to Arthur Felton; this man is not Arthur Felton; when this property was put before him, he claimed it; the only purpose is to show that he had taken an assumed name in New Jersey, which is certainly proper.
COURT. It is certainly proper.
Q. What did he say about it?
A. He said it was his.
Q. Did you find any weapons in the possession of Mr. Benson when you arrested him, or when you got him?
A. No, sir; not in his immediate possession; I did not.
Q. Did you find weapons at a room which he claimed?
A. Yes, sir.
Mr. WEBB. Wait a moment; you had better show he claimed some room.
Q. I mean did you find weapons he claimed at some room?
A. Yes, sir.
Q. What did you find that he claimed?
A. Found one revolver and a knife, and a sack with some cartridges in it in a drawer in his room, and the policemen that arrested him——
Mr. WEBB. Never mind.
A. I found two pawn tickets on him and went down to the shop and got his stuff, that he said was his.
Q. What did you say you found at the pawn shop?

A. Found a revolver and this little grip, and a filed glass, I believe it was.
Q. Who claimed the revolver, if anyone?
A. Benson.
COURT. The defendant?
A. Yes, sir.
Q. And what else?
A. The field glass and little grip, and at another place was a gold ring.
Q. Did you bring the articles with you?
A. Yes, sir.
Q. Have you them in your possession?
A. Yes, sir.
Mr. WEBB. That is objected to.
COURT. I don't think there can be any possible objection.
Q. Where did you get these?
A. At the pawn shop.
131 Q. Who did you say claimed that?
A. Benson.
Q. Was he present when you got it?
A. No, sir; I got them in Philadelphia, and he was in Camden.
Q. When did he see the goods to claim it?
A. I don't remember when he seen it. He first asked me about it two or three days after he got that pistol.
Q. Now, the other one; where did you get that?
A. Out of the drawer.
Q. Did he claim that?
A. Yes, sir.
Q. And what else?
A. The field glass.
Q. Claim this knife?
A. Yes, sir.
Q. Where was that?
A. In his room.
Q. These cartridges?
A. That is what I got out of pawn shop.
Q. That was a plain gold ring?
A. Yes, sir.
Mr. ADY. I desire to offer this to the jury. [Indicating cartridges].
COURT. Let the other side examine it.
Mr. WEBB. We object.
COURT. What is it?
Mr. ADY. The attending physicians testified that the deceased had evidently been hit in the back of the head with a sand bag or bag of shot, or something of this kind. I merely wish to offer this in connection with that testimony.
COURT. I can not see any objection.
Mr. ADY. There is another point on which it might be allowable. The am'unition there it contains fits those guns.
COURT. Is there am'unition in the sack?
Mr. ADY. I understand so; I have never opened it.

COURT. I don't think that would throw much light on the subject, anyhow?

Mr. ADY. Does the court exclude the contents of the sack?

COURT. Yes, sir. If you wish to show by this witness that it is am'unition, you can open it and see.

Q. You can open that [indicating sack] and see what it is.

A. It is the first time it has been opened.

Q. Did you ever open that before?

A. No, sir.

Q. Has it been in your possession since you received it?

A. It has not been where I could see it.

Mr. WEBB. The court understands that we object?

COURT. I do not understand that you object to the witness opening the pack and seeing what is in it. I understood your objection to go to passing it to the jury and offering it in evidence, which was sustained.

Mr. WEBB. I object to all this, having reference to all articles; and when the court permitted the introduction, and when counsel offered to show it, I objected to that.

COURT. So far as it is to show that the am'unition is for these revolvers, your objection is overruled.

Q. Is it a fact that part of these cartridges fit one of the revolvers and the others the other?

A. Yes, sir.

Mr. ADY. I offer it in evidence.

COURT. It is admissible for the purpose of showing it is am'unition for these revolvers.

Q. Mr. Pickens, did Mr. Benson have any conversation with you at any time after his arrest?

A. Yes, sir.

Q. Concerning his relations with the deceased, Mrs. Mettman?

A. Yes, sir.

Q. What did he say about that?

Mr. WEBB. That is objected to.

Q. At the time of such conversation were you offering to him any inducement or lieniency?

A. No, sir.

Q. Was anyone at the time he made this talk?

A. No, sir.

Q. Now, I will ask you what, if anything, he said about the relations he had with Mrs. Mettman?

Mr. WEBB. We object.

COURT. Objection is overruled.

A. In what way do you mean?

Q. Criminal intimacy?

A. Yes, sir; he made a statement.

Q. What did he say?

132 A. He said that he had had connection with Mrs. Mettman.

Q. What, if anything, did he say in that conversation, or while returning from Camden, N. J., about getting any money from Mary?

A. He said he had got $440 dollars from her.

Q. Did he tell you when and how he got it?

A. Yes, sir; I believe he did.

Q. What did he say about that?

A. He said she gave it to him.

Q. Did he tell you when she gave it to him?

A. I think he told me it was Monday night after the old lady was missing.

Cross-examination:

Questions by Mr. WEBB:

Q. You say that you are jailor and deputy sheriff?

A. Yes, sir.

Q. I will ask you if you were deputy sheriff at the time Mrs. Mettman turned up missing?

A. That was last March, a year ago, I believe; yes, sir.

Q. Did you take any part as deputy sheriff or otherwise in trying to ferret out the criminal or supposed offender?

A. None at all, sir.

Q. Was the first action you took when you went to New Jersey for the purpose of bringing him back?

A. Yes, sir; Sunday evening, the 20th, I started.

Q. When was that, if you remember?

A. It was some time in September; on Sunday before I started there; I believe it was about the 24th or 25th of September; somewhere along there; but don't remember the date.

Q. You say when you reached Camden you found Benson under arrest?

A. Yes, sir.

Q. I think you said in the city hall building?

A. Yes, sir.

Q. And that the package was exhibited to him in the mayor's office in your presence?

A. Yes, sir; a day or two after I got there.

Q. Where did Benson stay after your arrival until you brought him here?

A. In the city jail part of the time and in the county jail part of the time.

Q. You say that the box was shown to him and you described that box. Do you know where that box came from? That is, it was shown by the mayor. Do you know how it came into the mayor's possession?

A. Yes, sir; I think I do.

Q. How did it? I am speaking of your personal knowledge.

A. No, sir; didn't see him get it.

Q. Did you take it to him there?

A. No, sir; only ordered it; I notified the postmaster to deliver it there; the postmaster didn't deliver it to the mayor personally though; he delivered it to the chief of police, as I understand it.

Q. Were you there when he delivered it to the chief of police?

A. No, sir.

Q. Or know who delivered it to the chief of police or mayor?

A. No, sir; I do not personally.

Q. You say that when the box was produced to Benson he said it was his?

A. When the box was opened he said the contents were his; he didn't say the box was his.

Q. You say you found the weapons. Will you not pick up one of the revolvers for the purpose of identifying?

A. Yes, sir (picks up).

Q. Where did you get that?

A. In a pawnshop in Philadelphia.

Q. Did you ever shot it to this defendant?

A. I am not positive whether I showed it to him or not; it seems to me I did.

Q. You were asked here, Mr. Pickens, whether or not he admitted any ownership or claim to that revolver, and I want to know if you showed it to him?

A. I can not be positive whether I did or not; I showed him this grip and this revolver was in it.

Q. Never mind that. Then you are not positive that he admitted that he owned that identical revolver?

A. Yes, sir; I think so.

Q. Well, if you never showed it to him or showed it in his presence, how are you positive?

133 A. He said that the grip was his and the large revolver was his in the grip.

Q. He didn't describe the revolver?

A. Yes, sir, he did; he said it was a Colts large revolver.

Q. You don't know that he saw it?

A. No, sir.

Q. That other revolver, you say, was found in some room in Camden, N. J.?

A. It was brought down out of a room in a drawer.

Q. That one you say was shown to him?

A. Yes, sir.

Q. You got one in Camden and the other in Philadelphia?

A. No, sir; both in Philadelphia.

Q. Then I misunderstood your answer. I will ask you if you got a revolver in Camden?

A. No, sir; got one out of a pawn shop and one out of his room.

Q. Where did you get that knife?

A. Got that knife in the same place I got the short pistol.

Q. In the room?

A. Yes, sir.

Q. Was that shown to him by you or by any one in your presence?

A. If one part of it was shown all was shown; I don't know positively that I did.

Q. Where did you get that sack of cartridges?

A. The same place I got the knife.

Q. You don't know whether that was shown to him or not?

A. It never was opened; the contents were never shown to him, I know.

Q. You say that Benson's statement that he had been criminally intimate with Mrs. Mettman? Let me ask you if you are not mistaken, and that he said that he had been criminally intimate with Mrs. Rautzahn and not Mrs. Mettman?

A. No, sir; I am not mistaken.
Q. Where did he make such a statement to you?
A. On the train between Philadelphia and here.
Q. You say he told you that Mary had given him $440?
A. Yes, sir.
Q. And you say that was on Monday night?
A. I think it was.
Q. Did he tell you where he was when she gave it to him and the circumstances attending the transaction?
A. Yes, sir; he did some.
Q. What did he say?
A. He said she brought it out of the house and gave it to him; I don't remember; that was the substance of it; that she brought it out of the house and gave it to him somewhere in the back yard.
Q. Do you remember whether he gave in detail to you the whole transaction with Mrs. Rautzahn down to and including the receiving of the money that Monday night, or just simply a single remark?
A. He said she brought him the money and that he would have been a fool if he didn't take it.
Q. I will ask you if when telling you about the money, that when she came out to give him the money she woke him up; did he make such a statement?
A. Don't think he said anything about going to sleep?
Q. But you say he did say she brought him the money and that he would have been a fool if he didn't take it?
A. Yes, sir.
Q. What, if anything, did he say about having a handkerchief around his head?
A. Don't think he said anything.
Q. Do you know the calibre of the pistols?
A. Don't know whether I do or not; think they are .44.
Q. Both of them?
A. Yes, sir.

Mrs. ALICE FOSTER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ADY:
Q. Your name is Mrs. Foster?
A. Yes, sir.
Q. You reside in the city?
A. Yes, sir.
Q. You know Mr. Pickens, the deputy sheriff?
A. I do.
Q. Do you know Mr. Benson?
A. I do.
Q. Is your husband a merchant?
A. Yes, sir.
Q. Do you remember about the time that Mr. Benson was arrested and brought back here?
A. Yes, sir.

Q. Did you receive from Mr. Pickens on his return a box containing jewelry?

134 A. I did.

Mr. WEBB. Objection as immaterial, etc.

COURT. Objection is overruled.

Q. What jewelry was there?

A. It contained a diamond solitaire ring and a cluster diamond ring, a watch, and a number of smaller articles.

Q. Is that the box?

A. Yes, sir.

Q. In which you received it from Mr. Pickens?

A. Yes, sir.

COURT. This lady can go just far enough to establish her ownership.

A. The more valuable articles are not in the box at present.

Q. Was there any paper at the time around the box?

A. I forget.

Q. But this is the box?

A. Yes, sir.

Q. You may state, if you know, who was the owner of that box and property.

A. I was.

Q. State whether or not you voluntarily surrendered possession of that box to any one.

A. I did not.

Mr. WEBB. Objects to box being offered as evidence.

COURT. It is not offered in evidence; they seek to establish by this witness that the property was not Benson's, and that is as far as the matter is material.

Mr. WEBB. I move to strike testimony from record.

COURT. Motion will be overruled.

No cross-examination.

SAMUED DODD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by Mr. ATWOOD:

Q. What is your name?

A. Samuel Dodd.

Q. Where is your residence?

A. Camden, N. J.

Q. What official position, if any, do you occupy?

A. Chief of police department.

Q. You see the defendant sitting beside counsel?

A. Yes, sir.

Q. Ever see him before, in Camden?

A. Yes, sir.

Q. State to the jury, as near as you can recollect, when you saw him first in Camden.

A. On or about Sept. 15th last.

Q. Where in Camden did you see him?

A. On a street called Pennsylvania avenue.

Q. Under what circumstances?

A. Well, there was a murder committed in the house next door to where he was staying.

Mr. WEBB. I object; I want that stricken out.

Q. State whether or not it was then and there you saw him.

A. I saw him there at that time.

Q. Where next, if at any time, did you see him?

A. Saw him at the city hall in Camden.

Q. In whose custody was he then?

A. Officers of the law.

Q. What was said by him to you, or by any other person in your presence, or by any other person to him in your presence at that time?

A. He was under arrest, and an officer of the law said to me, "I arrested this man Felton." I stepped up to him and said, "Is your name Benson?" He said, "No, sir, my name is Felton." I said, "You are wanted in Leavenworth for murder." He said, "I never was in Leavenworth. I know nothing about it." I said then to the officer, "Lock him up until we investigate further." I said no more to him that night, and in an hour after that I notified the mayor——

Q. No matter what you said to the mayor.

Q. Did you subsequently to that time hear him make any statement to anybody?

A. No, sir.

Q. Later on? What, if anything, did you hear him say later on?

A. Later on, when Deputy Sheriff Pickens came on, he asked me; he said he was in search of a man——

COURT. No matter about conversation with Pickens.

135 Q. Just what Benson said or what was said in his presence?

A. Twenty-four hours later he acknowledged that he was the man that they were looking for in Leavenworth.

Q. What did he say?

A. Said his name then was Benson and not Felton.

Q. What, if anything, did he say relative to this homicide?

A. Nothing at that time.

Q. Did he at any time later?

A. The next day after that he said to an officer——

Q. No matter about that.

A. We went in and heard him say that he knew of the murder; knew all about it; that he didn't do it, but knew who did do it.

Q. With whom was he conversing at the time?

A. An officer of the law.

Q. He was a member of your force there?

A. Yes, sir.

Cross-examination:

Questions by WEBB.

Q. At the time you heard him make some statement to an officer of the law, I think you said it was, you were standing by and heard what was said?

A. I was standing close enough to hear what was said; yes, sir.

Q. You say he said he didn't commit the murder?

A. Yes, sir; he said he didn't commit the murder.

Q. He said he knew who did commit it?
A. Yes, sir.
Q. Did he say when he learned who had committed the murder?
A. No, sir; didn't say anything of the kind.
Q. He didn't say to you or in your hearing when he knew that the murder was committed?
A. No, sir; did not.
Q. And didn't state by whom or when he ascertained who had committed the murder?
A. He did not.
Q. Did he state who had committed the murder?
A. He did not.

MAX GROENFELDT, a witness on behalf of the plaintiff, being recalled, testified as follows:

Questions by Mr. ADY.

Q. Since you testified the other day has your translation been extended by the stenographer?
A. Yes, sir.
Q. And have you compared the testimony as written out with him with the original slips, and letters, and exhibits?
A. Yes, sir.
Q. You may look at these and state whether or not that is the extension.
A. Yes, sir.
Q. Does this transcription contain a correct translation of the letters and slips that were introduced to you in German?
A. As far as it was possible for me to decipher it.
Q. Did you find some slight corrections?
A. Yes, sir; two slight corrections.
Q. I ask the witness to read it.
A. Read the corrections or the words?
Q. If there is no objection you can read the whole.
COURT. There can be no objection.
WEBB. I don't think so.
Witness read the translation and defendant, Benson, read the original letters and slips. (See translation, next page.)

136 *Exhibit "B," stated by counsel to witness as Exhibit "A."*

KANSAS CITY, *April 11th*, 1890.

Mrs. BENSON:

I notify you that I have to leave Kansas City. I see from the papers that my name, C. A. Benson, is connected in them with awful lies. I can not bear it. What have I to do with Mettman's family? I am quite innocent of the whole affair. That cursed lying woman who accuses me of this wants to lay this on my shoulders. She is a false snake. She shall go to hell with her damned lies. Now, farewell. Greet my daughter, Rosa, for we shall never meet again, Mrs. Benson. Go to Kansas City and get my things, which are in 511 Bluf street, room number six; you will find a key in my old clothes, the other key I have with me. The

furniture I bought for forty-five dollars. You have a right to fetch everything. Rent is paid up to the first of May, 1890. Don't believe that I have anything to do with the murder. Nobody in Leavenworth shall or can see me any more. Now I end, and we are separated forever. Good-bye.

BENSON.

Exhibit "A," stated by counsel to witness as Exhibit "C."

KANSAS CITY, *April 11th*, 1890.

Dear Mrs. BENSON:

I must notify you of the disgrace I have brought on you, for my name is in the papers, and I am prosecuted. It is a deep fall I made. I have deceived you horribly, you my good wife. I had a secret love affair for over three years with Mary Rautzahn. She was during the whole summer and the whole winter every three or four weeks with me in Kansas City, and has kept house for me. Mrs. Chauncey is a witness for it and can swear to it. She lives on Sixth and McGee street, east. Her husband is a painter. She knows everything. Another witness is Mrs. Lauer. She lives still in the same house, 511 Bluff street; my room is number six. Look at your house, among my old iron, there you will find a key which fits the lock in my room, and fetch the other things which I bought for fifteen dollars. You will find a cloak, Mary Rautzahn's, her morning wrapper, her overshoes, her apron, her night shirt, her knives, pepper-box. All these things she procured in order to come next month with the children, but since the murder happened of the mother she
137 wants to clean herself of the whole business and lays the blame on C. A. Benson, who is entirely innocent of the murder. She makes me and my whole house wretched. The authorities are looking for the murderer. They don't know that Mrs. Rautzahn knows everything and that she is the cause of everything. She says in the papers that on the evening before the murder C. A. Benson had come to her yard and had intended to speak to the mother. This is a damned lie. C. A. Benson arrived Saturday evening, March 22d, ten p. m., at Mettman's, and Mrs. Rautzahn received C. A. Benson very warmly, and this is the first thing Mrs. Rautzahn said to C. A. Benson: She said: "Mother wants to see you," whereupon I went into the house and Benson had a little conversation with Mrs. Mettman, returned into the house and out came again Benson's beloved Mary Rautzahn, and spent with Benson until Sunday morning united in deepest love until between two and three o'clock, then Benson went to the depot and went to Kansas City at six o'clock. (Witness here stated that the one line was blotted out and not legible.) The Rautzahn is a false snake which knows everything; she will put it on Benson. Also about the muffler, it is a damned lie. She never gave me a muffler. I have once more to say that I am innocent of the whole murder, but not innocent in regard to my love affair. Mrs. Rautzahn is now Mrs. Waldo. One must ask for Mrs. Waldo to who she gave the four hundred dollars, for she knows the whole secret about the whole business. On the 22d of March I wrote to Mary, Mrs. Waldo, that I would come to visit her, and not her mother. Mrs. Benson, now you know everything. Farewell forever. I shall leave immediately Kansas City.

Mrs. BENSON. Hereby I notify you that I am married with Mrs. Rautzahn since last year for over about six months. My name is Richard Waldo, and Mrs. Rautzahn's is Mrs. Waldo. You will hear everything in Kansas City. All the people there are witnesses; even in the factory they know it that I am married with Mrs. Rautzahn, now Mrs. Waldo, since last year. I gave a keg of beer. All the people will tell you that Mrs. Rautzahn or Mrs. Waldo has always presented herself as my wife. She is the only cause of the whole business. The mother didn't have the four hundred dollars with her. Mrs. Rautzahn should confess to whom she gave the money; then the world will know everything. The truth is
138 the mother was in her way for a long time, and also you, Mrs. Benson, because she could enjoy better her hours of love. She is a miserable snake. One should hear Mrs. Rautzahn; then you will know everything. Now she can better live in incest with her old man. Now she is alone with him. No, my dear, sweet girl, you have believed that you could put everything on Benson, but Benson will show it to you, you miserable snake. How can you dare and bring Benson into misfortune, since he is innocent of the murder, but not of the love affair with you during the last three years? Farewell, Mrs. Benson, forever. Fetch my things.

Exhibit One, stated by counsel to witness as "D."

Old Mettman is innocent of the whole affair. He don't know anything about the murder of his wife. Mrs. Rautzahn knows everything. Mettman never killed his wife. He don't know anything about the love affair of his daughter, nor about the murder.

Exhibit Two, stated by counsel to witness as "E."

Mrs. Shanesey, painter, East 6 and McGee st. Dear Johanna: These are the names of the housekeeper, who will explain to you everything what she knows of Mrs. Waldo. (This is Mary.)

Exhibit Three, stated by counsel to witness as "F."

Mrs. Lauer, Number 511 Bluf street, room one, two, and three. This is the housekeeper, Mrs. Lauer. She knows Mrs. Waldo, or Mary, who has kept house for me.

Exhibit Four, stated by counsel as "G."

DEAR JOHANNA: Since we shall never meet again, I beg you a thousand pardons. Forgive me everything. It was not my fault. The fault only was with Mary. She has lost me honor, wife, and child, and now, since she is alone with her father, she wants to lay the whole blame on me, Albert. Mary knows well to who she gave the money. She knows the whole secret. I confess openly that I have nothing to do with the murder, but with Mary Rautzahn I had to do over three years. That is everything I have to say. Now, good-by. Forgive everything. Your husband.

ALBERT BENSON.

Exhibit Five, stated by counsel as "H."

Search my room. You will find everything that will give you
139 a clew about Mrs. Rautzahn. You may pack everything. Everything is al' right with my satchel, and in the satchel are her things; things belonging to Mrs. Rautzahn; morning dress; and then call Mrs. Shanesey; she will tell you everything most accurately that Mrs. Waldo, Mrs. Rautzahn, has kept house for me, and that she has worn the same dress. Mrs. Rautzahn knows the secret about the four hundred dollars and about her mother. You will find a muffler still, now a present of Mrs. Rautzahn. What I have in possession is not the muffler of which Mrs. Rautzahn says that it was Benson's. This is a mere invention, for she is a sneaking snake. She is always after married men. Benson has already spent on her several hundred dollars. She will confess. She only plays double.

Exhibit six, stated by counsel to witness as "I."

She wants to lay everything on the mother because the mother can not say anything in order that it is said that Mrs. Rautzahn may be innocent. No, the mother knew everything about the love affair with her daughter and Benson. The mother was always paid. When it was said that Mary was working she was in Kansas City with Benson and kept house for Benson. Now she wants to say that the mother wanted to see Benson. No, the daughter wanted to see Benson in order to gratify her love. Now, since the mother is dead, Benson shall carry the whole burden, where she is the only guilty one. Benson has had nothing to do with the murder. Only Mary. Another witness is a family, Morris, West Ninth street, 1215, Kansas City, Missouri. They can testify that I lived at Mrs. Morris' sleeping room. Mr. Morris is a barber. He knows Mary Rautzahn or Mrs. Waldo. He knew that Mary Rautzahn or Mrs. Waldo came every three weeks on a visit. Also the family Whiteman can testify. They live in Garnett, Kansas. They can testify that Mrs. Rautzahn was with me and known as Mrs. (It is blotted out.)

140 Mr. ADY. Your honor, I do not remember whether I offered the pistols, knife, and telescope in evidence; if not, I now offer them.

COURT. They are admitted.

Mr. WEBB. If your honor please, this morning your honor gave us notice that unless we could find some provision of the Federal statute that would authorize the sending of the jury to inspect the grounds, etc., which is the subject of this testimony, that the application would be denied. I have been unable to find any express provision of the statute, but in running through the revision of 1878 it seems to me that the practice in the State courts in actions at common law, whether civil or criminal, except as prohibited by an act of Congress, should control in the Federal courts.

COURT. So far as applicable, yes, sir. The authorities are in conflict upon the question; some holding it can not be had in the absence of the statute, and the others holding it can be done. It certainly is not error to decline to allow the jury to have a view.

Government here rested its case.

141 JAMES DOANE, a witness called on behalf of the defendant, testified as follows:

Questions by Mr. WEBB:

Q. You have already been sworn and testified on the part of the Government?

A. Yes, sir.

Q. You are the same person who was chief of police a year ago last March and April in Leavenworth?

A. Yes, sir.

Q. Let me ask you, Mr. Doane, whether you were at the place on the Missouri River where the remains of a woman, supposed to be Mrs. Mettman, were found?

A. No, sir.

Q. Do you know anything about the garments that were on the body when found?

A. I saw them at the undertakers?

Q. Did you know what became of them?

A. No, sir; did not.

Q. I want to ask you if there came into your possession any letters that were said to have been taken from the dress of that woman?

A. No, sir; not that I remember.

Q. I will ask you if you had been acquainted with Mrs. Mettman in her lifetime, and her daughter?

A. Yes, sir.

Q. And all the members of the Mettman family?

A. All with the exception of the father. I knew them by sight.

Q. After the remains were found were you at the Mettman house?

A. Yes, sir.

Q. I will ask you if you went all through the premises?

A. Yes, sir.

Q. I wish you to state the condition of the basement or cellar of that house at that time.

A. At that time I was not through it. I was through it afterwards.

Q. How long afterwards?

A. On the day of the funeral.

Q. That was the Sunday following the finding of the body?

A. I believe it was.

Q. Well, at that time what was the condition of that cellar? Just state how long it was and how wide, and what was in it.

A. Well, I didn't measure it; the cellar was swept up very clean; in fact, it was scrupulously clean and it was pretty well filled up.

Q. What was it, floor or ground; was there any floor there?

A. No, sir; dirt floor; looked to me as though it had been swept very clean.

Q. How large an open space appeared to be swept?

A. It appeared to me that the whole centre of the cellar had been swept.

Q. I don't want to go in details, but I want you to tell me the character of the articles that were in there, whether barrels or boxes, and what they were?

A. I don't remember; it was generally such things as are in cellars.

Q. Is there a flight of stairs to go down from the upper part of the house into the cellar?

A. There was.

Q. Did you examine these?

A. I walked down them. I examined everything in the cellar.

Q. What was the appearance of the stairs at that time?

A. I didn't notice anything particularly.

Q. How were they with reference to being clean or uncleanly?

A. They were clean.

Q. Was there any door that led from that cellar on the same level?

A. Yes, sir; one led out south, I think, under a porch, if I am not mistaken, but there might not be a porch.

Q. When you passed through the door, what was there *there*?

A. Passed out into the back yard.

Q. From there what was the direction to the barn, if there was a barn?

A. South.

Q. What distance?

A. Thirty or forty feet.

Q. I will ask you if you examined that barn?

A. Yes, sir.

Q. What did you find in the barn?

A. Well, we found sacks. I believe there was an old carpenter establishment there, and boxes and such things as usually are found in stables.

Q. Any animals?

A. There was a horse at one time. Don't remember whether the horse was there at this particular time.

Q. What kind of sacks did you find there?

A. Looked like grain sacks.

Q. Is there any other name by which they were known except grain sacks?

142 A. Well, gunny sacks or grain sacks.

Q. Did you find any article there for tying sacks?

A. There was some twine there.

Q. Let me ask you if you saw the sacks down at the Missouri River containing a part of the body of, or supposed to be the body of Mrs. Mettman.

A. Yes, sir; saw one of the sacks.

Q. Did you observe the sacks and the twine with which it was tied?

A. Yes, sir.

Q. I wish you to state to the jury how those gunny sacks, or sacks that you found in the Mettman barn and the cord or twine there compared with those found in the river.

A. Well, they could have been the same.

Q. What is your best judgment as to whether they might have been out of the same lot?

COURT. The counsel for the other side don't object, but I do; the question to ask him is to describe the sacks. I do not care about this witnesses opinion.

Q. Just describe the sacks; their size and material.

A. I don't know the material they were composed of; they would hold about a bushel and a half or two bushel; I didn't measure them.

Q. I will ask you if you examined that horse.

A. I did the day the body was found.

Q. State if you noticed anything particularly calling your attention to the horse, and if so, state what it was and what examination you made?

A. I examined the horse with a special purpose.

Q. State what you found, if anything.

A. I found that the horse had been washed on one side of his neck in front of where the saddle would go.

Q. How recently, judging from the appearance of the horse?

A. It was a day or so before.

Q. You say he had been washed?

A. It seemed to me; his hair was ruffled on one side and not on the other.

Q. What, if anything, was done, if you know, with the saw found there?

A. It was taken to police headquarters to the best of my recollection.

Q. What kind of a saw was that?

A. Carpenter saw.

Q. How with respect to the teeth, was it a fine saw, or medium or coarse?

A. It was an ordinary carpenter saw; about medium size so far as the teeth were concerned and rather old and rusty.

Q. State whether or not there was any fire arms of any description found on the premises.

A. The officer I sent to arrest Mettman brought down either a .32 or .38 Smith and Wesson to the best of my recollection.

Q. What became of it?

A. It was in the office; I turned over everything to Mr. McGahey.

Q. What time did you turn them over to him?

A. On the 9th of last August.

Q. Among the articles found I will ask you if there was a muffler.

A. There was.

Q. Can you describe the muffler?

A. Yes, sir. It was a merino muffler and it had been cut bias; it was about that (indicating) long; it was variegated; different colors and had figure S like a Paisely shawl pattern.

Q. What became of it, if you know?

A. I left it there with Mr. McGahey.

Q. Do you know whether it was shown to Rosa Benson, the daughter of the defendant?

A. No, sir; it was not.

Q. Do you know whether she ever saw it or not?

A. I never showed it to her.

Q. I will ask you if you ever made an arrest of Mrs. Rautzahn.

A. Yes, sir; arrested her twice; ordered her arrested, rather; sent an officer after her.

Q. When was the first time she was arrested by your authority?

A. It was some time in the fore part of April.

Q. Let me ask you if at that time the defendant Benson's name had been mentioned in connection with the homicide?

A. No, sir; not at that time.

143 Q. How long was she kept in custody at that time?

A. I kept her right along.

Q. How long did you keep her?

A. A couple of days, I suppose.

Q. Then she was released?

A. Yes, sir; I released her.

Q. When was she arrested again?

A. About the middle of April.

Q. I will ask you whether that was the last time she was arrested and whether she has been in custody since?

A. That was the last arrest I remember.

Q. Two arrests in all then?

A. Yes, sir.

Q. At the time of making the first arrest I will ask you if you had any conversation with her concerning the disappearance of her mother, and if you did, state when it occurred and where it occurred?

A. The first conversation I had with her was in the office. I asked her if she knew anything in regard to the disappearance of her mother, and she said that all she knew was that she left the house Sunday evening and never returned.

Q. At any time after that I will ask you whether you had a conversation with her in her father's house.

A. I did sir.

Q. When was that?

A. That was the day her mother's body was found; before she was arrested the first time.

Q. I will ask you where that conversation took place and whether any one else was present or not?

A. It was in the front room.

Q. Was any one present besides you and she?

A. Murphy went in with us, but I am not certain whether he staid or not.

Q. I will ask you whether that was the only conversation you had in that room with her?

A. Yes, sir; at that time it was.

Q. I will ask you if you asked her at that time anything about the persons who visited at the house, and if you did, what she said in reply to your question?

A. I put that question to her and she said there was nobody visited the house; she said she was a widow and living in seclusion and that they had a little trouble in the family and for that reason nobody visited; she repeated it and called on God Almighty to witness the fact.

Q. That, you say was the day the body was found?

A. Yes, sir.

Q. I will ask you if in that conversation anything was said about Benson?

A. No, sir.

Q. I will ask you whether you did have a conversation in which Benson was mentioned?

A. Yes, sir; I had several conversations with her; my wife being acquainted with her, I told my wife to go down into the cell; the first day Benson's name was mentioned; she told my wife——

COURT. Never mind that. You are just to answer where you had the conversation.

Q. Where was the first conversation that you had with Mrs. Rautzahn in which Benson's name appeared?

A. I took the muffler and asked her if she recognized the muffler, and she said she did. I asked whose is it? She said: Benson's. I said: Are you positive? She said, yes, sir; I am.

Q. What did she say, if anything, about Benson visiting her, and how often and when she saw him last?

A. She told me that Benson was there Saturday night at ten o'clock and staid until about twelve or one.

Q. I am only asking you about the conversation, whether at any time she told you how often Benson had been there and when he had visited her last.

A. She told me at one time that she had not seen him since Christmas, and then she told me he was there on Saturday night before the murder; I think it was the 22d of March.

Q. I will ask you if she made any statement about the money, as to who had took it away and what became of it, or whether she told you her mother took the money and put it in her bosom and went away with it?

A. Yes, sir; she said her mother had the money.

144 Q. When did she tell you that?

A. She told me that when she was first arrested.

Q. Did she say what money it was and how much?

A. She said it belonged to Henry; I think it was $400 or over; that it was between two ticks, and she went to get it and it was gone.

Q. I will ask you if you were at the place on the reservation which has been designated here by other witnesses as a place where some blood was found and some teeth?

A. No, sir.

Q. How long had you known the Mettman family; that is, Mrs. Mettman and Mrs. Rautzahn?

A. 10 or 12 years.

Q. During the last year or two, or a few months prior and down to the time that Mrs. Mettman disappeared, I will ask you if you knew the relations existing, and whether they were friendly or otherwise, between Mrs. Mettman and her daughter?

A. I know, from what the mother told me, that she didn't like the daughter.

Mr. ADY. I object.

Q. I asked you if you knew their relations.

COURT. Mr. Doane, I hope it will not be necessary for me to call your attention again.

A. Can I answer all Mrs. Mettman told me?

COURT. You can answer the question whether you knew the relation existing.

Q. The question I asked was whether you knew the relation existing?
A. No, sir.
Q. I will ask you, then, were you a frequent visitor at the house or visited there?
A. No, sir.
Q. I will ask you whether you heard a conversation between Mrs. Rautzahn and John Mettman at the jail?
A. No, sir.
Q. I will ask you if you heard a conversation between them anywhere?
A. No, sir.
No cross-examination.

N. G. SINGLETON, a witness called on behalf of the defendant, testified as follows:

Mr. WEBB:

Q. You testified the other day, did you not, for the Government?
A. Yes, sir.
Q. While you were testifying a saw was produced, which you identified as one belonging to you?
A. Yes, sir.
Q. And you testified that the defendant asked you for the loan of the saw?
A. He did.
Q. Do you know whether he took it away with him or not?
A. I saw him take it off the nail.
Q. Do you know whether he took it away from the room?
A. No, sir; I do not.
Q. I will ask you whether the blade in the saw produced here is the same as when he asked for it?
A. No, sir; it is not the same.

Cross-examination. Mr. ATWOOD:

Q. Was the blade the same kind of a blade, the same pattern and size?
A. Yes, sir.

E. C. MURPHY, a witness called on behalf of the defendant, testified as follows:

Mr. WEBB:

Q. Mr. Murphy, you gave testimony the other day as a witness for the Government in this case?
A. I did.
Q. I believe you are the officer that went to Kansas City to look after some things there?
A. Yes, sir.
Q. You stated that some things that were found in rooms claimed by Benson in those letters, and you named over a good many things. I desire to know if you didn't find letters from Mrs. Rautzahn to Benson?
A. I stated that I thought I did.
Q. How many did you find?
A. I would not be positive about it.

Q. About how many?

A. I know that Rosa found them; she called my attention and
145 translated them in German; I took charge of them, and I thought, and I think so now, that I gave them to Mr. Soper, I think it was; I would not be positive.

Q. He is the assistant attorney?

A. Yes, sir.

Q. When did you give them to Mr. Soper?

A. Don't remember now.

Q. About how many letters were there?

A. One or more slips; it was not letters exactly; there was a letter amongst them.

Q. Have they been in your possession or under your control since they were delivered to Mr. Soper?

A. No, sir; I am not sure that I gave them to Mr. Soper, but I gave them to somebody, but I don't know.

COURT. It is your best recollection that you gave them to Mr. Soper?

A. Yes, sir.

Q. You say they were read by Rosa Benson at that time?

A. Yes, sir.

Q. And interpreted by her to you?

A. Yes, sir; she read them.

Q. I will ask you if they were found in the same drawer, room, or place that these slips you produced.

A. They were found in the same room; there was only one room occupied by the things.

Q. I want to ask the witness a question. Did you when on the stand the other day testify concerning any examination of the spot where it was said the teeth were found?

A. I think I did.

Q. I will ask you if you remember being out there in November last at the time I was there?

A. Yes, sir; I was there with you.

Q. I will ask you if the place where the teeth were found and the place where it is said blood was found at the head of the ravine—if you remember pointing out those places to me and designating them?

A. I do.

Q. I will ask you to state the distance from the head of the ravine that you pointed out to me, where it is said that it was supposed somebody had been cut up, directly to the fence south—what was the distance?

A. I could not tell you because I never measured it.

Q. I forget whether you were asked the other day?

A. No, sir; I was not asked that question. It is a short distance.

Q. At the head of the ravine, at the place where it was said by some witness that it looked like somebody had been laid upon the grass, I will ask you whether there were any bones in that ravine then?

A. I didn't notice any; there may be; I didn't notice.

Q. I have reference to the time when you were there when I was?

A. There may be; I won't say positively; I would not say there was or there was not.

Q. You did testify the other day that the muffler that was picked up was shown to Mary Rautzahn in your presence by Mr. Doane two or three weeks afterwards?

A. I said that that was the best of my recollection.

Q. I will ask you if that same muffler was at any time shown to Rosa Benson?

A. Not to my knowledge.

Q. I want to show you these [indicating] papers and ask you whether you are able to identify these letters as those read by Rosa Benson?

A. I don't think I can; they are all German. That [indicating] is, to the best of my recollection. I can not say that I saw this [indicating]. I remember that one [indicating], and to the best of my recollection I remember seeing that in the room; I am pretty sure I seen this [indicating]. I am positive as to the small slip.

No cross-examination.

GEORGE SUTTON, a witness called on behal f of the defendant, testified as follows:

Mr. WEBB:

Q. Mr. Sutton, when you testified as a witness last week, I will ask you if you visited the place on the reservation where it was said the teeth were found, and at the head of the ravine close by, since you gave testimony here?

A. Yes, sir.

Q. I will ask you if you made a measurement from the head of the ravine to the fence?

A. Yes, sir.

Q. What distance was it?

A. 64 feet.

146 Q. The fence at the nearest point?

A. Let me show you on this map.

COURT: Point out on the map.

Q. Take this map—that is the Government road up that way to the fort; there is the Government fence there; here is the gate at this corner?

A. This point here [indicating] to the fence here——

Q. Which would be southeast?

A. Yes, sir; 64 feet.

Q. The distance from that point to the gate [indicating]?

A. I say that the distance from this gutter here [indicating], at the time I measured that with another officer, was 95 paces right west to that fence running north and south, and 115 paces to this gate south, and over there to the fence running north and south 95 paces.

Q. That is paces?

A. Yes, sir; 95 paces to that fence north and south and 115 to the gate.

Q. That is what you gave the other day?

A. Yes, sir.

Q. And the last time you measured from there [indicating] it was 64 feet?

A. Yes, sir.

Q. I will ask you if there is—I believe that was testified to the other day, yet I am not certain—but I ask you if there is from that place where you measured off 64 feet—if there is a main road that leads on?

A. There is a road about ten feet from the fence?

Q. I will ask you if that is a macadamized road?

A. I think it is; it is Broadway; don't know whether it is macadamized all the way, but it is part of the way.

Cross-examination, Mr. ATWOOD:

Q. Is that the main road to the fort?

A. No, sir.

Q. The extension of the Seventh street road is the main road?

A. Yes, sir.

Q. The road connecting Broadway?

A. Yes, sir; and it is very little traveled.

B. A. KELLY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Mr. WEBB:

Q. Where do you reside?

A. Leavenworth.

Q. How long have you resided here?

A. Since 1857.

Q. What is your occupation?

A. Contractor and builder.

Q. I will ask you if you are acquainted with the Fort Leavenworth military reservation?

A. Yes, sir.

Q. Have you been employed by the Government and worked at the fort there?

A. Yes, sir; I have.

Q. I will ask you if you know where the fences are so far as they inclose that reservation or any part of it nearest the city?

A. Yes, sir; I know where they are.

Q. Are you familiar with the road which leads to the fort?—called the macadamized road or Grand avenue?

A. I don't know it by that name.

Q. Well, the main road that leads to the fort?

A. Yes, sir; I know the main road.

Q. I will ask you if you are acquainted with the streets in this city including Broadway?

A. Yes, sir.

Q. I will ask you whether in going along the highway that leads from Broadway diagonally across there [indicating on the map] to the main road that leads to the fort from the head of Seventh street, whether you go from the head of Seventh street?

A. Yes, sir; that road is the extension of Seventh street; I know where it is, sir.

Q. I will ask you if you are acquainted with John Mettman?

A. No, sir; I am not acquainted; know him when I see him.

Q. How long have you known him?

A. Off and on for 20 years.

Q. I will ask you whether you saw him in the month of March a year ago in the morning?

A. That I would not be quite positive of, but I thought I saw him one morning when I was going to the fort.

Q. Whereabouts did you see him?

A. At the pasture there.

147 Q. Where was he, inside of the pasture or outside of the pasture?

A. Inside the pasture when I first saw him.

Q. Let me call your attention to these diagrams here for the purpose of getting points. This [indicating] is supposed to represent Broadway. This [indicating] is supposed to be one fence; that [indicating] is the gate there; this [indicating] is supposed to be another fence. Do you recognize the locality?

A. Yes, sir.

Q. Now, with reference to that fence and that gate, where did you see Mr. Mettman?

A. As near as I can locate it it was in here [indicating] somewhere.

Q. About how far from the gate?

A. I could not say; just noticed him inside the fence.

Q. Did he have anything with him?

A. Yes, sir; he had a parcel.

Q. Did you notice what it was?

A. No, sir; I did not.

Q. State whether or not he was alone, or anyone in company with him.

A. He was alone; it was between 9 and 10 o'clock in the morning.

Q. I will ask you if you remember the time that Mrs. Mettman disappeared?

A. I knew nothing of it at the time; I remember the time; yes, sir; I remember her disappearance; yes, sir.

Q. I will ask you if this was before or after the body was discovered?

A. It was before.

Q. How long before the body was found?

A. I think it was three or four days.

Q. Could you give the day of the week?

A. I would not be certain; I think it was Tuesday.

Q. Of the same week in which the body was found?

A. Yes, sir; I think it was.

Q. Which way was he going?

A. Towards the city.

Q. I will ask you if there is any road, if you are familiar with the pasture there, or field there, to be able to say whether there is a road which would lead to the fort?

A. There is no road I know of.

Q. How far were you from Mr. Mettman when you saw him at that time?

A. When I first saw him I suppose it was a couple of hundred yards, or three hundred yards.

Q. I will ask you whether you approached him or he you?

A. We met and passed on the road.

Q. Whereabouts with reference to the gate?

A. Halfway between the gate and the north line of the city.

Q. Where were you going?
A. I was going up to the fort.
Q. Can you say whether he came through the gate?
A. I could not say whether he climbed over the fence or came through the gate or came th'ough the fence.
Q. After you met him which way was he going?
A. Walking towards the city.
Q. And you from the city towards the fort?
A. Yes, sir.
Q. Did you speak with him?
A. No, sir.

Cross-examination, Mr. ATWOOD:

Q. As I understand you, you are not certain that it was John Mettman?
A. I could not say positively.
Q. You say it was between nine and ten?
A. Yes, sir.
Q. And he had a parcel, and came towards the city?
A. Yes, sir.
Q. So that if it was John Mettman, and that parcel contained his wife's body, he was lugging it down town?
A. I don't know what he was lugging down town.

148 ROSA BENSON, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

By Mr. WEBB:

Q. Miss Rosa, you have already testified in this case?
A. Yes, sir.
Q. I will ask you if you saw a muffler in anybody's hands that was said to have been found on the reservation a short time after Mrs. Mettman disappeared?
(Plaintiff's attorney objects to question until it is shown that it was found on the reservation.)
A. Do you wish me to answer?
Q. Yes.
A. I did see a muffler.
Q. Where was it when you saw it?
A. Mr. Doane brought it to me where I was at work.
Q. That is the Mr. James Doane, then chief of police?
A. Yes, sir.
Q. Where did he bring it to you; at what particular place?
A. At J. C. Floras, corner Spruce and streets.
Q. You were at work there at the time?
A. I was.
Q. Did you examine it?
A. I did.
Q. Can you describe it?
A. I can.
Q. Describe it, then.
A. It was just a three-cornered piece, and the middle piece was what I considered a Prussian pattern, and it had a black border, and very much soiled.

Q. I will ask you if you ever saw that muffler prior to Mr. Doane's showing it to you?

A. I never saw anything that looked like it before until that moment?

Q. I will ask you if you know of your father's having a muffler?

A. He had no other muffler except a red silk one.

Q. I will ask you to state whether that muffler that Mr. Doane showed you was or was not the property of your father?

(Plaintiff's counsel object to question, unless the witness knows the fact.)

A. To my knowledge it was not the property of my father.

COURT. She says not to her knowledge.

Q. I will show you four papers. First, I will show you that
149 one and ask you whether you ever saw it before and where?

A. Yes, sir; in the washstand drawer, in Kansas City.

Q. Who was present when you first saw it?

A. Mr. Murphy.

Q. The officer?

A. Yes, sir.

Q. I will ask you if that was upon the occasion when you and your mother went down with Mr. Murphy for the purpose of getting the things belonging to your father?

A. Yes, sir.

Q. I will give you, then, all three. Take that smaller one next, and I will ask you whether you saw that, and if so, where you saw it?

A. I saw quite a number of letters, but the German handwriting looks all the same to me, and I cannot distinguish it.

Q. How many letters did you find there? Did you see other that were in German other than those you testified to the other day?

A. I think there were four or five.

Q. Did you look at them to see their dates, and by whom they were signed?

A. The only thing I noticed was that on the top: "Burlington, Illinois."

Q. All of them?

A. Yes, sir.

Q. I will ask you if this is the same date? If this is one of those that had Burlington, Illinois, on it?

A. Yes, sir; this is similar to them all.

Q. You say that is Burlington, Illinois; what is its date?

A. I don't know; it says February 23d, 1890.

Q. I will ask you to look at these and give their dates, place of date and month and year.

A. This is Burlington, Illinois, Feb. 24th, 1890, and this is Burlington, Illinois, February 18th, 1890.

Q. The smaller one, what is that if it has a date?

A. It has no date.

Q. I will ask you if they have any signature of any kind to them, any of them.

A. I can not read it; it it is German if it is there.

Q. What became of those letters—of those papers that were in German that were found there that day?

A. Mr. Murphy took them, or my mother did.

Q. Did she read them?

A. One or two; yes, sir,
Q. Were the contents stated to Mr. Murphy?
A. She just said they were, from the description of the reading, from Mary Rautzahn.
150 Q. To whom were they sent?
A. Mr. Richard Waldo.
(Plaintiff's attorney objects to witness stating contents of letters.)
Exhibits 11 and 12 given to stenographer for identification.

Cross-examination by Mr. ATWOOD:

Q. Miss Rosa, you stated that the muffler you had never seen was shown you by Mr. Doane?
A. No, sir.
Q. How long since your father went to work in Kansas City, that is, preceding the time of his going to New Jersey?
A. I think in the month of May.
Q. In what year?
A. 1890.
Q. He went to work in 1890 in Kansas City?
A. I do not remember the exact date.
Q. Do you not mean 1889; in other words had he not been at work there about one year when this trouble occurred?
A. Yes, sir; I think so.
Q. Had he been away from home some time preceding that, to Arkansas or some other place?
A. Yes, sir.
Q. How long was he gone that time?
A. I think he was gone just a few months.
Q. Now, during the time he was at work in Kansas City, as I understand you the other day, your father would come home once in a few weeks, and sometimes only once in five or six weeks?
A. Yes, sir.
Q. And then what articles might he not have had at Kansas City, and you not have known it?
A. No, sir.

Redirect examination by W. C. WEBB:

Q. When you say "No sir," what do you mean?
A. I mean that I have no knowledge of what clothing he had in Kansas City.
Q. I forgot to ask you a few questions which I will ask now. You gave your age the other day as 18 years last May?
A. Yes, sir; the past May.
Q. I will ask you if your father has been at home most of the time since you were old enough to recollect?
A. He has not been at home since we lived in Leavenworth most of the time.
Q. He was at home frequently, as you stated before?
A. Yes, sir.
151 Q. I will ask you if you know what your father's business is?
A. To my knowledge he was a machinist.

Q. State whether or not he has made or repaired guns to your knowledge, and kept them in repair?
A. At home?
Q. Do you know?
A. I know that he kept his own articles in repair.
Q. I will ask you if he had his own guns?
A. He did.
Q. How many were they?
A. I know he had one gun, and he had two or three smaller weapons, if I am not mistaken.
Q. Where did he keep them?
A. They were hanging in the room, on the wall.
Q. Do you remember of his having any guns that he sold to any persons?
A. For a while he had some little revolvers he sold. Then I have been in the shop where he was at work.
Q. Did you know what work he was engaged in?
A. The only time I visited him was when he was working in the Union Foundry as a polisher, right here in Leavenworth.
Q. And when was that?
A. I guess that was as much as five or six years ago.

Recross-examination by Mr. ATWOOD:

Q. A stove polisher was what he worked at?
A. No, sir; polisher.
Q. Polisher of what?
A. I don't know much about machinery, but at the foundry they manufactured stoves and he polished them up.
Q. And you say you are quite sure your father kept his weapons in repair?
A. Yes, sir.
Q. That is what we think.

152 Doctor GODDARD, a witness called on behalf of the defendant, testified as follows:

Mr. WEBB:

I want to call your attention to the gunshot wound that you stated was discovered in the head of the body that was found in the Missouri river in March a year ago, called the body of Mrs. Mettman, and ask you if you remember making any such measurements or examination of that wound to be able to state the calibre of the ball or the gun from which the ball was fired?
A. We examined the entrance and the track of the ball; yes, sir.
Q. I wish you to state what was the calibre, if you remember.
A. To the best of my belief it was made by a 42 or 44; it is hard to say the calibre.
Q. Do you remember giving testimony concerning that subject before the coroner at the coroner's inquest?
A. I gave testimony there on the subject.
Q. Do you remember what calibre you then fixed it to be?
A. I think I claimed it to be a 45, to the best of my recollection now.
No cross-examination.

Mr. ——— PETERS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Mr. WEBB:

Q. What position do you occupy in this city?
A. Signal service observer.
A. Did you occupy that position during the month of March, 1890?
A. I did.
Q. Is it a part of your duty as such officer to keep a record of the weather?
A. It is.
Q. Did you keep a record of the weather in March last?
A. Yes, sir.
Q. Have you that record?
A. I have.
Q. Will you turn to the same?
COURT. Do you mean March last, or March, 1890?
A. March, 1890.
Q. From the week commenceing March 23d, 1890, and ending March 30th, 1890, state whether or not there was any rain or snow.
A. There was; there was rain on the 26th and snow on the 27th.
Q. What days of the week were they, do you remember; or does that statement show?
A. It does not show.
Q. Rain on the 26th of March and snow on the 27th?
A. Yes, sir.
Q. How much rainfall was there?
A. Seven-hundredths of an inch.
Q. How much snow was there?
A. Probably about one-tenth of an inch.
Q. Was there any storm or wind that week?
A. Yes, sir; there was high winds.
Q. How high?
A. The highest velocity was thirty-six miles.
Q. When did those winds occur; on what days?
A. There was a high wind on the 26th, high wind on the 27th, and high winds on the 28th.
Q. How high was the wind on the 27th?
A. Thirty-six miles was the highest.
Q. What was the velocity of the wind on the 28th of March?
A. You mean the highest?
Q. Yes, sir.
A. Thirty-six miles.

Cross-examination. Mr. ATWOOD:

Q. You are the weather-bureau man?
A. Yes, sir.
Q. For my information will you tell me whether the records you keep are any more correct than the forecasts that have come from your bureau; but passing over that, you said it was seven-hundredths of an inch of rain; that is not very much rain?
A. No, sir; not very heavy.

Q. How much snow was there?
A. Probably one-tenth of an inch.
Q. Seven-hundredths of an inch rain and one-tenth snow?
A. Yes, sir.
153 Q. When did the rain fall; what day of the week?
A. Rain fell on the 26th.
Q. And the snow?
A. And the snow on the 27th.

E. C. MURPHY, being recalled on behalf of the defendant, testified as follows:

Mr. WEBB:

Q. Mr. Murphy, I want to call your attention again to the visit that you made last fall to the Government reservation at the time I was with you. I will ask you if you remember going from the reservation to the Mettman house, or from the Mettman house to the reservation; that if you were at the Mettman house with me at that time?
A. Yes, sir.
Q. I will ask you if you remember going through the barn and pointing out various localities and things in the barn?
A. I don't remember going in the yard. I staid outside with the team; I think I did. If I went inside I don't know it.
Q. I don't know that you did. What I want to call your attention to now is this: You were on the south side of the barn there with the team?
A. Yes, sir.
Q. Close to the gate and the barn?
A. Yes, sir.
Q. I will ask you if you remember calling my attention or observing, or if anybody else called the attention of myself or others to any particular appearance of the barn at that time?
Mr. ATWOOD. I object. You can tell the condition of the barn, but not what was said.
COURT. Objection is sustained.
Q. I will ask you in regard to the appearance of the barn; its condition then; whether or not there had been new battens put over the cracks or between the boards on the south side of the barn?
A. I think there was.
Q. About how many of them and how were they?
A. I could not say how many.
Q. You just describe it your own way?
A. I noticed there was some new lathes put on the barn on the south side on the outside.
Q. You call them lathes and I call them battens. I want to know if they are the same thing.
A. They were put over the cracks. Weather strips, they call them.
Q. That was the Mettman barn?
A. Yes, sir.
Q. And that was last fall?
A. Yes, sir; whatever time you were there; I guess in the fall.
Q. It was several months after the homicide of Mrs. Mettman?
A. Yes, sir.

Cross-examination. Mr. ATWOOD:

Q. You say the barn was newly weatherboarded when you looked at it, and this was several months after this homicide transpired?

A. Yes, sir.

C. A. BENSON, the defendant, at his request, was sworn as a witness in his own behalf, testified as follows:

Mr. WEBB:

Q. Mr. Benson, where were you born?

A. In Strasburg, French country, sir.

Q. How old are you?

A. Thirty-nine years.

Q. You are known here by the name of C. A. Benson or Charles Benson?

A. Yes, sir.

Q. Let me ask you what your father's name was?

A. My father's name was Agen. Felton. I don't know what you call it in English, and my name is Arthur Felton.

Q. How came it that your name was changed to Benson?

A. Because my father was dead and my mother married a man by the name of August Benson.

Q. And then you took the name of Benson?

A. Yes, sir; and he treated me like my father did, sir.

Q. You are a married man?

A. Yes, sir.

Q. Where were you married; in what country?

154 A. In Germany; in Prussia.

Q. When did you come to this country?

A. I first came in 1873, the 26th of April, 1873.

Q. Did you go back again?

A. Yes, sir; seven times.

Q. How long have you lived in this country continuously?

A. It may be seven or eight years altogether; I could not tell you hardly.

Q. When you first came to this country where did you live?

A. New York.

Q. In the city?

A. City of New York.

Q. What is your trade or occupation?

A. I learned gunsmith and a machinest.

Q. Where did you learn those trades or occupations?

A. Germany and Prussia.

Q. How long did you work at the gunsmithing business?

A. The last fifteen years.

Q. And how long as a machinist?

A. I came to this country to work in machine shops or gun shops?

Q. For how many years?

A. For the last twenty years about.

Q. Altogether?

A. Yes, sir.

Q. Where have you worked in this country; in what places; what cities or towns have you worked in?

A. New York is my home; New York and Philadelphia; I worked in Chicago and here in Leavenworth, Kansas City, St. Joe, San Francisco; different places; could not remember where I worked.

Q. What wages did you get, by the day, week, or month; how much was it?

A. My wages was $26 in San Francisco, California; that was the first I came to this country, the first year; I went there in 1877.

Q. How much in New York?

A. New York, $16.

Q. How much in Philadelphia?

A. $16.

Q. How much in St. Joseph?

A. Ten dollars and up and down

Q. How much in Chicago?

A. About $12.

Q. How much in Kansas City?

A. About $10.50 and received $13 once.

Q. How much in Leavenworth?

A. About ten dollars.

Q. How long have you lived in Leavenworth?

A. Sir, about five or six years.

Q. How much of a family have you?

A. Only one daughter.

Q. That is the little girl that has been in here called Rosa?

A. Yes, sir.

Q. The lady that was here several days ago, was she your wife?

A. Yes, sir.

Q. Did you ever know Mrs. Theresa Mettman in her lifetime?

A. Yes, sir.

Q. When did you first get acquainted with her?

A. Sir, I was living on Cheyenne street and Mrs. Mettman was living on Pawnee street; I didn't know the name there; and it was fourteen feet between us in the alley; my back gate comes to the alley and her back gate comes to the alley, and we went over from my house to her house; we visited Mettman's family; they came over to our house and we went over there.

Q. Do you know John Mettman?

A. Yes, sir.

Q. Do you know their daughter?

A. Yes, sir; I knew both daughters; I didn't know this one; there was another daughter.

Q. When you say this one do you mean the one that is now Mrs. Rautzahn?

A. Yes, sir; she was not at home at that time.

Q. How long did you and Mettman live neighbors, as you say, so close together?

A. It was close together we lived; I moved from that house first of October; no, I lived with Mettman together about in November, about Thanksgiving, until my house was built up and I moved; I bought some property here.

Q. Then you moved away?
A. Yes, sir; I moved away, sir.
Q. When did you get acquainted with the daughter, Mary Rautzahn?
A. That was in the year, December, 1886; last month in that year.
155 Q. Where did you get acquainted with her?
A. In her own house, or father's house; Mr. Mettman's house.
Q. Where had she lived up to that time?
A. Mettman told me——
COURT. Never mind that.
Q. She didn't live at home, at her father's house, when you first met the Mettman family?
A. O, no; no sir.
Q. You say you first met her in December, 1886?
A. Yes, sir.
Q. You may state whether you became well acquainted with her; on intimate terms?
A. Yes, sir.
Q. Did you become well acquainted with her?
A. I think—I guess—
Q. You may state on how intimate terms you got with Mrs. Rautzahn? I don't want you to into details, but you may state?
A. Mr. Mettman had a birthday party and I went to the party and I saw Mary and we had a good time at night and we were talking and Mrs. Rautzahn liked to see me, she heard so much of me that she wanted to see me, and I said you come and see me; she had heard of me; she said what time to come; I said Mrs. Benson is out part of the time and you come over, and that way I got acquainted with her.
Q. You may state whether you and Mary Rautzahn from that time became intimately acquainted and on intimate relations and continued for several years.
A. Yes, sir.
Q. Until the 22d day of March, 1890?
A. Yes, sir; Monday the 24th of March, it was.
Q. Now, Mr. Benson, you may state after you became acquainted with Mrs. Rautzahn you and she lived together anywhere, and if so, state where and how long?
A. Well, sir, I don't know dates, or days and months; I know that may be, but it is about 1888, I think, I guess I went to Kansas City and Mrs. Rautzahn followed me with both children and came out like she was my wife; we was there in the hotel in Kansas City, and she staid one week and then she got kinder homesick and say she could not leave father.
Q. How long did she stay with you in Kansas City?
A. We staid about a week.
Q. She had the children with her?
A. Yes, sir.
Q. State whether or not you invited her or she came of her own accord?
A. No, sir; she came to see me.
Q. Then when she came back to Leavenworth, when did you see her again?

A. It was about two or three months past after that.
Q. Where did you see her then?
A. In my own house.
Q. Here in the city?
A. In Leavenworth.
Q. When did you go to work in Kansas City at your trade?
A. I think that was in June; could not tell; the last days of May or June; it is very hard to tell.
Q. May or June of what year?
A. 1889.
Q. How often did you come home here to your wife and daughter from that time on?
A. I came home about two or three weeks, or four or six, up and down; could not tell correct.
Q. When you came to Leavenworth did you go to see your wife and daughter?
A. When I came home I staid with her some whole Sundays and then I didn't go to my home.
Q. What was the fact about your coming up from Kansas City? Did you—on what trains did you come and when did you go back?
A. Sir, my regular train I took to come and return back was all the time the Missouri Pacific train; my train arrived here about twenty minutes to ten o'clock in this city.
Q. At night?
A. Yes, sir.
Q. Then when you go back to Kansas City?
A. It is six o'clock; between five and six was ready to go to my work.
Q. Five or six in the morning or evening?
A. In the evening.
Q. Now, during the time that you were there how many times did Mrs. Rautzahn come down to Kansas City to see you?
156 A. Sir, it is very hard to tell; she was there two weeks sometimes and pretty near three weeks; it was up and down.
Q. You may state whether it is the fact that you and she arranged to live together as man and wife.
A. I must say, yes, sir.
Q. Under what name, Benson or Felton?
A. No, sir; under the name of Waldo.
Q. Richard Waldo?
A. Yes, sir.
Q. You may state whether she went by the name of Mrs. Waldo.
A. Yes, sir.
Q. When you were living with her under the name of Waldo, were you at work in the machine shops in Kansas City?
A. You mean by the name of Richard Waldo in the machine shops?
Q. What name did you go by where you worked?
A. By Benson.
Q. You may state if you used the name of Richard Waldo for any other purpose than merely as living as the husband of Mrs. Rautzahn.
A. Nothing else; no, sir.

Q. Now, Mr. Benson, you may state whether or not there was a correspondence between you and Mrs. Rautzahn. I mean whether she wrote you and you to her.

A. Yes, sir.

Q. How often? How frequent?

A. Six times.

Q. Yes; how many times?

A. I say, maybe six times.

Q. When you wrote to her, were your letters in German or English?

A. In German.

Q. When she wrote to you were her letters in English or German?

A. In German.

Q. I will ask you if you can write and read English as well as German.

A. No, sir; not quite so well.

Q. I will ask you if you know Mrs. Rautzahn's handwriting.

A. Yes, sir.

Q. Does she write in English or German?

A. In German.

Q. I now hand the witness the four papers marked by the stenographer 9, 10, 11, and 12, being the same four that were handed to Rosa Benson. I ask you to look at these.

A. Yes, sir.

Q. Who wrote those letters?

A. Mary Rautzahn.

Q. To whom did she write them?

A. To Richard Waldo.

Q. Who was Richard Waldo?

A. That is me.

Q. Mr. Benson?

A. Yes, sir.

Q. You may state whether or not you received them.

A. Yes, sir; I did.

Q. Where did you receive them?

A. In my own letter box; I got my own letter-box.

Q. Where?

A. Station A, Kansas City.

Q. They came to you then by mail?

A. Yes, sir.

Q. What did you do with them after you had read them?

A. Put them up in my room.

Q. Where was your room?

A. 511 Bluff street.

Q. When Mrs. Rautzahn came to Kansas City to live with you, where did you room or live?

A. Well, sir, we lived first in Ninth street, near, between Mulberry; could not say the other street so well; am not so well acquainted in Kansas City.

Q. Then after that where did you and she live?

A. Then lived both in Bluff street.

Q. Well, when was she down there living with you last? In what month?

A. In the month of March.

Q. In what year?

A. 1890.

Q. How long did she stay on that occasion?

A. I think she staid the last time about three or four days.

Q. When did she come back from Kansas City to Leavenworth?

A. That was about the middle of the month; could not say the day; the 8th.

Q. I will ask you if you came to Leavenworth in March any time?

A. Yes, sir.

Q. When was the first time in the month of March you came to Leavenworth to see Mrs. Rautzahn?

A. The 22d of March, Saturday night.

Q. You may state whether or not you came here on the 15th of March.

A. No, sir.

Q. What hour did you leave Kansas City on the 22d of March for Leavenworth?

157 A. I think about the same time; 8 o'clock.

Q. What time did you get here and where did you go?

A. I came here between 9 and 10; about twenty minutes; sometimes later.

Q. Where did you go to when you got here?

A. To Mr. Mettman's house.

Q. Who did you see there that night?

A. Mary Rautzahn.

Q. I want you to tell, in your own way, what took place that night. Tell where you first saw Mary Rautzahn, with whom you talked, what was said to you and what you said in reply, and how long you stayed and when you left. Talk so slowly that they can all hear and the man can write it down.

A. I came in the back gate; it was my old way; could not remember the street; it goes to Mr. Mettman's back yard, and Mary Rautzahn came and met me, opened the gate for me; well, I said, good evening; we had a little talk both together and we went to the basement, what they call it; she says to me, Richard, mamma would like to see you; I says, al' right, I don't see her in a good while; that is al' right; call her out; she says, I will. She went in and called mamma out and opened the door, and papa was sleeping, and mamma came out and Mary went back in the yard to the water-closet; but I won't say, and I says, hello, Mrs. Mettman; she says, hello; she says, how is your health, is it pretty good, she says; she says, Mary is coming next week to keep house with you ——

COURT. You can not repeat statements of this dead woman; you may state the conversation with Mary Rautzahn, but not the statements made by this dead woman.

Q. Then you need not state anything that Mrs. Mettman said to you or you to her. After the interview you had did she go into the house?

A. Yes, sir.

Q. You used the word, I think, mamma?

A. Yes, sir.

Q. Who do you mean when you say mamma?

A. Mrs. Mettman.

Q. After Mrs. Mettman returned to the house, state what Mrs. Rautzahn and you did, whether she came back to you, and, if so, state what transpired.

A. Yes, sir; she came right out; she asked me what mamma wanted; well, I says, mamma says you come next week and keep house with me and bring little son along; I said that won't do; I said Mrs. Benson will get hold of us; I said mamma may be right, but when you bring the little boy along he is big enough to tell the other children and then Mrs. Benson will hunt it out and we get trouble; that is what I told Mrs. Rautzahn; she says, if you don't take me out of the house I know what I am going to do with my children, I will jump into the river with them; I said, Mary, what makes you think so that way; I said, I paid ten dollars' rent and you says you would not come, and you says you would not run away from father; I said, now I fixed the house and now you says father won't let me go; I said, if you don't want to come I go my way and go to New York; then, I says, I go away to New York; no, she says, you dassent do that; I said, I took $50 and paid for the furniture, now; I said I paid $45, nearly $50, and, I says, I got not very much money; I says, if you don't want to come just stay with your father and mother; she says, I got some money; I says, if you got some money that is al' right, I am satisfied.

Q. Now, before you go any further, I want to ask you how much money had you spent on Mrs. Rautzahn or on her account during the years 1889 and 1890 to that time?

COURT. You need not answer that question.

Q. After she said she would furnish the money what was done?

A. Well, I didn't talk more about it because I gave her plenty of money and we sat down there and talked about it until Sunday morning, I think, until after one o'clock; maybe pretty near two o'clock; could not be sure.

Q. Where did you go?

A. I sent her in the house; she didn't say I was to go; I said, Mary, I think we better br*ake* up, because I got no watch with me; it is getting daylight. She went in the house and I went to my house.

Q. That was where your wife and daughter were?

A. Yes, sir.

Q. How long did you stay at home?

A. All Sunday, until my regular time after five, between five and six, I picked my bundle up and went to the train to Kansas City.

Q. You were at home all that day?

A. Yes, sir.

Q. Then you went back to Kansas City?

A. Yes, sir.

Q. What time did you get there?

158 A. Couple of minutes before eight.

Q. Where did you go when you got to Kansas City?

A. I met a friend standing at the depot and went to Ninth street, corner Ninth and Mulberry; that is Mr. Kelly's saloon, where I get beer.

Q. How long did you stay there?

A. Not very long; ten or fifteen minutes.

Q. Where did you go then?

A. Took the cable car and came to my home.
Q. What home was that?
A. Bluff street, 511.
Q. When you got to your place what did you do?
A. Got a lunch and staid in the house?
Q. Then what did you do; did you stay there all that night?
A. Yes, sir.
Q. What time did you get up in the morning?
A. My regular time, half past five.
Q. What did you do when you got up?
A. Dressed ready for work.
Q. Where were you at work at that time?
A. With the hay-press machine shop.
Q. Did you go to work?
A. No, sir.
Q. Why not?
A. I had a toothache and went up to Main street where the doctor or dentist, or whatever you call him.
Q. For what purpose?
A. To pull him out; he pulled some out before.
Q. Did he pull teeth for you that time?
A. No, not that time.
Q. But he pulled before?
A. Yes, sir.
Q. How many?
A. This one doctor two, and the other doctor pulled me out some.
Q. That was before that day?
A. Yes, sir.
Q. Why didn't you have the tooth pulled that time?
Q. Well, he pulled two out, and I was kinder afraid and I thought I would get a glass of beer, and I went in a saloon on 16th street to get a glass of beer, and then came down to get the tooth pulled and I went there but I didn't feel the toothache and I thought I would go to work, so I went to change my clothes to go to work in the afternoon.
Q. Did you go to work in the afternoon?
A. No, sir.
Q. Why not?
A. I went to the depot; I have to go around the depot to go to work; and I went to the depot and found a letter in my box.
Q. From whom?
A. From Mary Rautzahn.
Q. What day was that?
A. That was the 24th day of March.
Q. What day of the week?
A. Monday.
Q. Where is that letter?
A. I left so much letters in my house.
Q. In what house do you mean?
A. 511 Bluff street.
Q. Was that letter left there with the others?
A. No, sir; I scattered some letters.

Q. But that letter you got that Monday, was that left in the house with the others?

A. Yes, sir.

Q. Have you ever seen it since?

A. No, sir.

Q. Was it left there with these other letters?

A. Yes, sir; it was left around there in the house; Mary put letters away; where she put them I don't know.

Q. When you got the letter what hour was it?

A. Between 12 and 1 Monday, the 24th of March.

Q. And you said you had started to go to your work?

A. Yes, sir; had my working clothes on.

Q. After you got the letter what did you do?

A. Broke it and read it in the post-office and as soon as I read it and saw Mary would like to see me.

Q. What did you do after you read the letter?

A. I went to my house.

Q. Then what?

159 A. I went home and changed my clothes and went down in the bottom on Ninth street where I was well acquainted.

Q. Why didn't you go to work that afternoon?

A. I changed my mind because I go that night to see Mary.

Q. Did you go to Leavenworth that night?

A. Yes, sir; I did.

Q. On what train did you go?

A. Missouri Pacific.

Q. What time did you leave Kansas City, and what time did you get here?

A. Eight o'clock; and was here some time between 9 and 10.

Q. Where did you go?

A. Same road; to Mettman's back yard.

Q. Who did you see there, if anybody?

A. Mary.

Q. What was said then?

A. I said hello, and came in like the other time before.

Q. Go on.

A. She was kinder still, and I made all the time a litte joke and fun; and she said not to talk so loud; she said she was feeling a little bad, and I said, "Are you sick? She said she didn't feel very well; she said father didn't sleep. I said father was sleeping all the time, and I said now he don't sleep. She says "Don't talk so loud." She took me to the basement and we had a talk and Mary went in to see whether father was asleep. She said "Don't make so much noise." And I goes to the water closet; and she came back and we were sitting out and having a little talk; and then she went in again, and then I don't know; and I had my hand on my head and was kinder sleepy. When she came out again I said: "Is that the way you treat me, to go into the house and say nothing to me?" She said, "That is all right;" and then she had something in her hand wrapped up in a bundle or rag, and she said: "Put that in your pocket." I put it in my pocket and we had no more talk, and I started to go, she didn't treat me very well, and after I got a piece

she asked me about mother. She said: "What do you think about mother, that she left Sunday evening and didn't return," and I make fun, for her not to bother about mama; that mama would come home tomorrow morning; that is all I talked about mama.

Q. Did you go into the house that night?

A. No, sir; she would not keep me in the house.

Q. When you had been there before had you been in the habit of going in the house? Had you been in the bed room?

A. Yes, sir.

Q. When you were there on the 22d of March did you go into the bed?

A. No, sir; she would not keep me.

Q. When you were there on the 24th you didn't go into the house at all, except the basement?

A. No, sir.

Q. Now, what further was said, if anything, by you to her, or she to you about her mother on the 24th of March?

A. We talked nothing at all.

Q. Did you go away then from the house?

A Yes, sir; what was I to do; she would not keep me.

Q. Did you in fact go away?

A. Yes, sir.

Q. Did you in fact carry that bundle away with you?

A. Yes, sir; I took that package; took it in my pocket.

Q. Did you open it?

A. No, sir.

Q. Did you afterwards?

A. Yes, sir.

Q. Where did you look at it?

A. As soon as I arrived home.

Q. Where do you mean?

A. Kansas City.

Q. When did you go back to Kansas City?

A. I went back in the morning; I think about five.

Q. When that was handed to you did you know what it was?

A. No, sir.

Q. What did she say it was?

A. She said to me: "Richard, put this in your pocket and keep this." I says, "All right, that is all right."

Q. Did she tell you what to do with it?

A. No, sir; nothing at all.

Q. When you opened it, what was it?

A. It was all money; gold pieces.

Q. Did you go to work that day?

A. Yes, sir.

Q. At what hour?

A. Regular time; seven o'clock.

Q. I will ask you if you worked all day Tuesday?

A. All day.

Q. On Wednesday?

A. All day.

Q. And Thursday?

A. All day.
Q. And Friday?
A. All day.
Q. And Saturday?
A. Not quite all day; only about three-quarters of a day?
160 Q. What did you do Saturday?
A. I went by the barber's to have a shave, and the train leaves Kansas City for Leavenworth pretty near five o'clock; won't be sure; and I thought I would like to take that train before dark, and I went up to Bluff street to the barber and I missed the train; I could not get on it; that train was missed.
Q. Did you go to Leavenworth that night?
A. Yes, sir.
Q. Where did you stop? Where did you go?
A. I came over to where my Rosa lives.
Q. What time did you get home?
A. That was not ten o'clock; could not tell; think it was about 8 o'clock; I missed the first train. I was home before nine o'clock; walked home the whole way.
Q. How long did you stay at home?
A. I staid there the whole of Sunday.
Q. Then what?
A. Came home to my work.
Q. Was Rosa home that day?
A. Yes, sir; part of the time.
Q. Was there anything said about the Mettmans that day?
A. Yes, sir; heard talk on the train.
Q. What was said? When did you first learn that Mrs. Mettman was dead?
A. I heard some talk in Kansas City.
Q. Did you know anything about it when you got home?
A. Yes, sir; heard it all around me.
Q. When you got home, when Rosa was there Sunday, was there any talk about it?
A. Yes, sir; Rosa brought the news to me in the paper.
Q. Did you read about it?
A. Yes, sir.
Q. When was the first time you knew anything of it?
A. I learned it myself that Sunday or that Saturday night; I learned it myself in the paper.
Q. That was Sunday next after the 24th, was it?
A. No, sir; that was Sunday after the 28th or 29th; yes, sir, Sunday, 29th of March.
Q. You may state whether you ever told Mrs. Rautzahn that her mother was going to New York.
A. No, sir; how can I know that?
Q. Did you ever tell her so?
A. No, sir; could not say so.
Q. I asked you before and I ask you again, were you at the Mettman house on the 15th of March?
A. No, sir.

Q. You may state whether or not at any time when she was with you in Kansas City you made any statement about her being the 12th woman you had had?

A. No, sir; no, sir.

Q. Did you hear her testify here the other day?

A. Yes, sir.

Q. I call your attention to that question, and ask you if at any time you ever made any statement to her in words or substance that she was the 12th woman you had had, and if she didn't do what she said you would send her where you sent the rest of them?

A. I would die right here in this place before I would say that; no, sir; never in all my life.

Q. At any time or place did you ask her or talk with her as to whether her mother was likely to give you away?

A. No, sir; we never talked this language.

Q. I want you to state whether you ever told her that if her mother gave you away you would put a bullet through her head so cold that you would never take a second thought?

A. No, sir; never talked such language to Mary in my life.

Q. You heard her testify that you were intimate with her mother?

A. Yes, sir.

Q. I ask you if you were ever intimate with her, or had sexual intercourse with her mother?

A. No, sir; never in my life.

Q. I will ask you whether you sat here this morning and heard Mr. Groenfeldt read some letters and some slips?

A. Yes, sir.

Q. And you looked over the slips at the time he did?

A. Yes, sir.

Q. I will ask you if you wrote those papers?

A. I could not tell that; I hardly read them all; maybe I wrote them.

Q. Did you write two letters to Mrs. Benson?

A. I wrote some to Mrs. Benson.

161 Q. Did you write the two letters to Mrs. Benson?

A. Yes, sir; I wrote some to Mrs. Benson.

Q. I will ask you if you wrote that letter to Mrs. Benson [handing witness Exhibit "A"]?

A. That is my writing; I should say.

Q. I will ask you if you wrote that letter to Mrs. Benson [handing witness Exhibit "B"? [indicating other letter.]

A. I should say—I think—yes.

Q. That night, on the 24th of March, when you went to Mettman's and saw Mrs. Rautzahn, and the time she gave you that money, you may state whether you had anything on your head.

A. Yes, sir; I had my hat.

Q. State whether or not you had anything else.

A. No, I did not; I had my hat on.

Q. Did you hear Mrs. Rautzahn's testimony about you having something around your head?

A. Yes, sir; I did.

Q. Did you have anything around your head as she described it?

A. Never in my life.

Q. I wish you would take that last letter. (Witness shown Exhibit A.) I wish you would look at that letter where it says something about a muffler. Do you find anything about muffler?

A. Yes, sir.

Q. I want you to hold it in your hand while I ask you about it. There is one statement in this letter which I assume is rightly interpreted. I want you to look at it and listen to me: "The Rautzahn is a false snake which knows everything; she will put it on Benson." Is that right at that place?

A. Yes, sir.

Q. I want you to read the next sentence. Put it in English. Read the sentence after the words "put it on Benson," and put it in English. That says in English what?

A. That says "she shall say where the money is."

Q. That is not the place.

A. It says here that she states that there was a muffler found and she said it was mine. That is a big lie; that was not my muffler; I never wore a muffler in my life.

Q. What is the next sentence?

A. She gave me a muffler for a present, and I never wore them because I didn't wear a muffler.

Q. I want it read. I wish you would translate it. You point that out.

Witness Max Groenfeldt here examines letter and said: Now let me read as he explains his writing.

Mr. ATWOOD. I want Mr. Groenfeldt to read what he finds there.

GROENFELDT. A. "She is a false snake; she knows everything; she wants to put it on Benson about the muffler; this is a damned lie. This is a damned lie. She gave me a muffler, a new one, which is in my room."

Mr. ATWOOD. Is that what is there?

GROENFELDT. I made it out this way, and he tells me that certain letters are missing; it certainly is written very badly; it takes an expert to tell what he meant by these letters. Then, it may be this way: "She is a false snake who knows everything; she wasnt to put it on Benson." It might be read that way because it is very badly written. It may be: "Gave me a muffler that is new."

WEBB. Do you read it that way? If you do, I want you to correct that.

GROENFELDT. I would like to take another gentleman with me and compare it.

COURT. The controversy seems to be about one word, whether it is one or never.

WEBB. It reads here: "She gave me a muffler," and then stops. There are two or three places that I want corrections.

GROENFELDT. I will read once more this passage: "She is a false snake that knows everything; she wants to put it on Benson; about the muffler, that is a damned lie."

ATWOOD. We want the witness' best judgment.

GROENFELDT. It is my best judgment that it is "she never." This is written in German au and the other ie. It is hardly possible to make it out.

162 ATWOOD. That is your judgment?

A. Yes, sir.

COURT. There are some additional words there.

Mr. WEBB (to Groenfeldt). I will ask you to read it. "She gave me a muffler;" what is the next words?

GROENFELDT. "She never gave me a muffler," I would read it.

WEBB. And then?

GROENFELDT. "This one is new."

WEBB. That is not here at all.

GROENFELDT. There is no grammer whatever, and that is what I said before. It is an important matter, and I don't want the responsibility.

COURT. How about the additional words?

GROENFELDT. I believe I said I could not read these: "This one is new."

WEBB. I wish, your honor please, that that correction be made.

Mr. ADY. If the defendant swears it is as he contends it is I will let it stand. I would not change Groenfeldt's translation.

Q. I want to call your attention, Mr. Benson, to the statement in that letter where it reads here: Now "she (that is, Mrs. Rautzahn) can live in incest with her old man." It is further on in the letter than where we were looking at last night.

A. I have got the place.

Q. It reads here, and you say that is correct according to your understanding, "One should hear Mrs. Rautzahn;" and then "She can live in incest with her old man." I will ask you why you wrote that, and whether Mrs. Rautzahn told you about her living in incest with her father?

Mr. ADY. We object; it is incompetent.

COURT. Objection sustained.

Q. Then that is all. Now, Mr. Benson, you stated that Mrs. Rautzhan gave you a rag or cloth containing some money. Did she tell you at the time she gave it whose it was, or anything about it?

A. No, sir.

Q. You may state whether you knew at the time what it was.

A. I didn't know at that time that I got it.

Q. Did you know at that time whose it was?

A. I never knowed that.

Q. I will get you to state whether Mrs. Rautzahn told you that she could not give you the money because it was her brother's money?

A. She never said so.

Q. You have already testified about your being there on Saturday night, the 22d of March, and leaving Sunday morning. Now, I want you to state whether on that occasion and at that time you made any arrangements to come back to Mettman's and see Mrs. Rautzahn?

A. No; I did not. I didn't make any statement. She said only to me: "You must come sometimes often and see me; you wait too long."

Q. I say, did you agree as to any particular time you would go back?

A. No, sir.

Q. I want to ask you whether you made an arrangement with her that you would come back Monday or Tuesday and get some clothes to take to Kansas City?

A. She says she write a letter if she wanted me; that is what she told me.

Q. I don't know as you understand me. I want to know definitely whether you were to come back by agreement then, or wait for a letter?

A. Wait for a letter.

Q. Now, in any conversation you had with Mrs. Rautzahn, was there anything said about Henry meeting with an accident any time?

A. No, sir.

Q. I want you to state whether or not, in a conversation with Mrs. Rautzahn, you told her that Henry would meet with an accident and that her father would get the insurance money?

A. I never knew that Henry Mettman was insured.

Q. Did you have any such conversation?

A. No, sir; never.

Q. In any conversation with her was there anything said by you to her or she to you about her father not living a great while?

A. No; how can I know it?

Q. But did you talk that way?

A. No, sir; no such words.

Q. In any conversation you had with Mrs. Rautzahn you may state whether this statement, in substance, was made or not: That Henry
163 would meet with an accident, his father would then get the insurance money; then that Mr. Mettman would not live a great while, and that Mary would then get all the property?

A. No, sir; if she told me so I would leave in a minute; I never talked that way; no, sir.

Q. Your attention was called on yesterday to whether or not you told her that Mrs. Mettman would go to New York. What was your answer?

A. No, sir; never told that Mrs. Mettman would go to New York.

Q. I want to ask you if you told her that her mother would go to New York, and that you would meet her on Broadway?

A. No, sir; never.

Q. I want to ask you to state whether or not you demanded of Mary to go and get the money?

A. No, sir; I never told Mary to get the money; I didn't know whether Mary had money or not; I didn't know whether money was in the house; I had money plenty myself; I didn't know about the money being in the house.

Q. Now, Mr. Benson, these two articles [indicating] were produced here by other witnesses. I want to hand them to you. I will ask you if you know what they are, and whose they were?

A. Yes, sir; I have got a half dozen.

Q. Did you have these?

A. Yes, sir.

Q. Where did you leave these [indicating mustaches] when you went away?

A. I got them about a week before from Professor Ury in New York; I had them in the envelope that the professor sent me from New York.

Q. What did you get them for, and what did you use them for?

A. Sir, I am a performer, and perform on the stage.

Q. What kind of a performer?

A. Sleight of hand. Well, I could not explain so well in English, but what Professor Herrman do; you heard about Professor Herrman?

Q. Did you perform for money or just simply for amusement?

A. For money, and sometimes in private houses for amusement?

Q. How long have you been engaged in such kind of performances?

A. Fifteen years.

Q. I will get you to state whether or not you had these articles, or any like them, for any other purpose than amusement?

A. Yes, sir.

Q. Well. Did you understand my question? Did you have them for ony other purpose than amusement?

A. No, sir; no.

Q. What size boots or shoes do you wear?

A. Six and seven.

Q. I wish you would put your foot out there so that the jury can see it?

A. Yes, sir. [Witness exhibits his foot.]

Q. When did you leave Kansas City?

A. How is that, judge?

Q. You were up here on the 30th of March, at your house where your wife was?

A. Yes, sir.

Q. Before I pass these mustaches I want to ask you a question. When I asked you about your kind of performances what name did you give?

A. Sleight of hand.

Q. I ask you if you know a performer by the name of Herrman?

A. Yes, sir; he learned me the tricks.

Q. I will ask you if you traveled with him?

A. Yes, sir; I did.

Q. For how long?

A. In the old country and in this; I was able to do work by myself then.

Q. Now, I will ask you about your leaving Kansas City. You came up here and was at home on Sunday, the 30th of March?

A. Yes, sir.

Q. That is the time that Rosa was at home and read the newspapers about Mrs. Mettman's death?

A. Yes, sir.

Q. And you went back to Kansas City again?

A. Yes, sir.

Q. I want you to say when you came from Kansas City, and how long you staid in Kansas City.

A. That Monday night.

Q. Where did you go to then?

A. St. Joe.

Q. Then where did you go?

A. Kansas City; back again.

Q. Then how long did you stay in Kansas City?

A. Staid over a week in St. Joe and over two days in Kansas City.

Q. Then where did you go?

A. To my old home in New York and Philadelphia.

Q. And there you remained until you were brought back here?
A. Yes, sir.
Q. While you were in Philadelphia where did you work?
164 Q. There across the river, in Camden?
A. In Philadelphia, sir.
Q. Did you have any rooms in Camden?
A. Yes, sir; a whole house.
Q. I will ask you if this is your instrument. [Indicating.]
A. Yes, sir; that is mine.
Q. Where did you get it?
A. In New York, the 3d of July.
Q. What year?
A. 1890.
Q. What did you buy it for?
A. I sold my other one and I bought that.
Q. Did you have one when you went away?
A. No, sir; nothing at all.
Q. I will ask you if you had any at Kansas City.
A. Yes, sir; I had a little one.
Q. How large a one?
A. About this long. [Indicating.] Bought them for fifty cents.
Q. Did you have any other one except that in Kansas City?
A. No, sir.
Q. You may state whether or not that is yours? [Indicating large pistol.]
A. Yes, sir.
Q. Where did you get that?
A. Same place.
Q. New York?
A. Yes, sir.
Q. I now hand you the knife that was produced upon the witness stand.
A. That is mine. I made that twenty years ago; I shot that deer myself.
Q. That you had with you when you were here at Kansas City?
A. Yes, sir; I had that over twenty years.
Q. To what uses did you put that knife?
A. I put it through my hand when performing tricks to show people.
Q. Part of your sleight-of-hand work?
A. Yes, sir.
Q. Now I hand you this sack and ask you to state what that is and just where you got it? [Indicating cartridges.]
A. I bought them for my Winchester rifle, but used them for revolvers.
Q. When did you buy it?
A. Bought them at the time I was in Philadelphia.
Q. What time? What month?
A. In the month of July.
Q. What year?
A. 1890.
Q. I will ask you if you had either of those revolvers or sack here in Leavenworth or Kansas City.

A. No, sir; bought them in Philadelphia; the whole outfit, except the field glass that I got from Maine; Portland.

Q. I wish you to state where you bought those revolvers.

A. I bought them in New York.

Q. Where did you buy the cartridges?

A. In Philadelphia.

Q. Did you see the gentleman that was on the stand yesterday, Mr. Dodd, the chief of police of Camden?

A. Yes, sir.

Q. Do you remember seeing him in Camden?

A. Could not say so; could not say sure.

Q. I will ask you if you saw Mr. Pickens there.

A. Yes, sir.

Q. He is the man that came after you and brought you back?

A. Yes, sir.

Q. I will ask you if you told the man that testified yesterday, Mr. Dodd, that you knew who killed Mrs. Mettman.

A. Oh, no; I never did; if I knowed it I would tell it before the whole people; that is a misunderstaning; when I talk people don't understand me; they don't understand me at all; no, sir; never did.

Q. Now, let me ask you if you did know who killed Mrs. Mettman.

A. No, sir; I never did.

Q. Did you kill Mrs. Mettman?

A. No, sir; never did; I treated Mrs. Mettman like a mother and she treated me like a son, and I could not do such things.

Q. Did you stand by and see anybody kill her?

A. No, sir; I did not.

Q. Did anybody ever tell you that she was to be killed?

A. No, sir; no, never; no, sir.

Q. Did anybody ever tell you that she or any man tell you that he killed her?

A. No, sir.

Q. After you left the Mettman house on Monday night, March 24th, 1890, were you ever back to that house?

A. No, never; no, sir.

Q. Do you know where the Fort Leavenworth military reservation is, or any part of it?

165 A. I am not acquainted with the reservation; got no time to go over there and fool times away.

Q. Do you know where Broadway is?

A. Yes, sir; I know Broadway very good.

Q. Do you know where Seventh street is?

A. I do.

Q. Have you ever been out the Seventh street road and out the macadamized road to the fort?

A. Yes, sir; I was by where Mr. Patterson burnt his house; that is all I know about the fort.

Q. When you go out Seventh street out to the fort—first let me ask you, do you know where Metropolitan avenue is in the city?

A. No, sir.

Q. When you go out the Seventh street road, do you know where the field is off to the left?

A. Yes, sir; there is a field on the reservation.

Q. Were you ever in that field?

A. No, sir.

Q. Do you know the name of that stream that runs under the macadamized road as you go up to the fort?

A. No, sir; I do not know.

Q. Have you ever been down to the Missouri River opposite to that bridge? The bridge on the fort road?

A. Yes, sir; when I went to St. Joe.

Q. Have you been down to the river?

A. No, sir; never had time to go down to the river.

Q. Have you, at any time since you lived in Leavenworth, owned or kept a horse?

A. No, sir; not in Leavenworth.

Q. Did you own or keep any mules since you have been in Leavenworth?

A. No, sir.

Q. Have you, at any time since you have been in Leavenworth, or did you in March, 1890, have around your premises any gunny sacks?

A. No, sir; I got nothing at home except my daughter and wife, and I don't have sacks.

Q. On the night of the 24th of March, when you saw Mrs. Mettman, did you give her anything?

A. On the 22d of March?

Q. 22d, I mean; I made a mistake.

A. Yes, sir; I did.

Q. What did you give her?

A. I gave a handful of candy and peanuts.

Q. How much candy?

A. A handful, and told her to give it to the little girl.

Q. How much peanuts?

A. Handful.

Q. Was it in a sack?

A. No, sir; I had it in my pocket.

Q. After that Saturday night you left there, or Sunday morning, I will ask you if ever you saw Mrs. Mettman again?

A. No, sir; I never did.

Q. Did you ever see the part of the body that was said to be Mrs. Mettman's body?

A. No, sir.

Q. Now, Mr. Benson, why did you go away from Kansas City as you stated?

A. Well, sir, you didn't let me tell you why I went away.

Q. I ask you now?

A. I have no work, sir; I was laid off by the superintendent about four weeks, and am not a man to fool around, and that is why I left Kansas City.

Q. Was there any other reason for going away?

A. No, sir; I came back and wanted to work and they had nothing to do, sir.

Q. I call your attention to these letters in which you tell Mrs. Benson that you saw your name in the papers.

Mr. ADY. I object; that it is not proper cross-examination.

The COURT. You may ask him his reason for going away.

Q. I will ask you what reason you had for going away?

The COURT. He has stated that; you may ask him if he had any other reason.

Q. Did you have any other reason for going away besides want of work?

A. No, sir.

Q. On yesterday I asked you where you went when you returned to Kansas City on the night of Sunday, the 23d; I now ask you if you went to any particular place that night besides the saloon?

A. Not particularly; I went over to Ninth street and talked with friends.

Q. Did you see anybody on Fifth street that night?

A. Yes, sir.

Q. Who did you see?

A. There was a shoemaker that worked for me, and I came back there and was passing and his wife was standing in the door.

Q. Do you know the name of that shoemaker?

A. Yes, sir, but not correct; Heffler, or something; I saw his
166 name, but don't remember the correct name.

Q. What time did you see him there Sunday night?

A, Maybe nine o'clock, or couple of minutes after nine.

Q. Was that before you went up on Ninth street?

A. That was Sunday night, the 23d.

Q. Have you seen that man here?

A. Yes, sir.

Q. Describe him.

A. He was a man of about 200 pounds or 150. He is very thin now and looks very poorly; and he had black whiskers, and he was a shoemaker, and had no children, and he played an ac'ordeon in his house. That is all I know.

Q. Had he done any work for you before that?

A. Yes, sir.

Q. How long before the 23d of March?

A. About a month. More than that I could not tell, sir.

Q. What kind of work had he done?

A. He made a pair of new soles in my big boots.

Cross-examination Mr. ATWOOD:

Q. Mr. Benson, you said you didn't know who killed Mrs. Mettman?

A. I didn't.

Q. Why did you write this: "Mrs. Rautzahn should confess to who she gave the money. The world will know everything then?"

A. Mrs. Rautzahn, what I understand in the papers, tried to make it understand that the mother had the money. That was too much for Benson; he could not stand that at all. He told her to tell the truth and the world shall know. I got the money. She gave it to me.

Q. Why did you write that? Answer that question.
A. I wrote that to Mrs. Benson.
Q. Why did you write that if you did'nt know?
A. I know she gave me the money, and she told it in the papers that the money was stole.
Q. That is not my question. Can you answer that question or not?
A. I told you.
Q. That is all the answer you can give, is it?
A. What shall I give?
Q. I ask you if that is the only question?
A. I can't talk any better than that.
Q. Why did you write the words I have just read?
A. When Mrs. Rautzahn tells then the world knows. Then she knows that I didn't take the money at all.
Q. You say your name is Arthur Felton?
A. That is what it is.
Q. Where did you get the name Charles?
A. My father's name was Benson. I don't know about Charley.
Q. Have not you gone in Leavenworth by the name of Charles Benson?
A. C. A. Benson; not Charles Benson.
Q. What does C. stand for?
A. It stands for Carl.
Q. Where did you get the name of Carl? I thought you said it was Arthur Felton?
A. I have got name Richard, Carl, and Albert.
Q. What does A. stand for?
A. The A. is for Arthur Albert.
Q. So your name is Carl Arthur Richard Felton Benson?
A. No, sir.
Q. What is your name, then? As I understood you in your answers to judge, *me* was Arthur Felton, because that was your name, and Benson because a man named Benson married your mother?
A. Yes, sir.
Q. Was not your mother's name Waldo?
A. Don't know my mother's birth name.
Q. Where did she get the name of Waldo?
A. What did Waldo have to do with my mother?
Q. Where did you get the name of Waldo?
A. Mary called me by that name.
Q. Did you not go by the name of Waldo in Kansas City?
A. No, sir; I did not.
Q. Have not you said so in these letters?
A. Yes, sir; Mary said to go by the name of Waldo.
167 Q. Then you did go by the name of Waldo?
A. Yes, sir; I did.
Q. You say you were not in Leavenworth on March 15th, 1890?
A. I was not.
Q. When did you send word to Mary that you were coming on the 22d, or tell her?
A. I didn't send word to her at all.

Q. Did she send for you?
A. Yes, sir; wrote half a dozen letters in a week.
Q. In that week?
A. No, sir; not in that week.
Q. I am asking if she wrote letters succeeding the 15th of March or not.
A. Did not.
Q. Then how did she know you were coming on the 22d?
A. I told you we made it up before that she would keep house for me.
Q. When was that?
A. Two or three weeks before; told me to come and see her.
Q. When?
A. The 22d.
Q. Told you to come on the 22d?
A. Yes, sir.
Q. State whether you saw Mrs. Mettman, who is now dead.
A. Yes, sir.
Q. You had some talk?
A. Yes, sir.
Q. Afterwards you staid with Mary until a late hour and then went away and went home?
A. Yes, sir.
Q. What time did you get home?
A. I could not tell you correct; it was in the morning; very late in the night.
Q. Was Mrs. Benson in bed?
A. Yes, sir.
Q. Then you left Sunday night about five o'clock and went to Kansas City?
A. Yes, sir.
Q. You got to Kansas City at what time?
A. 8 o'clock.
Q. Where did you go?
A. I go down to 9th street.
Q. Where was it that you met these friends you spoke of?
A. In the depot.
Q. Who were they?
A. Named "Bill" and "Jim."
Q. What was the names?
A. Bill and Jim.
Q. Jim and Bill? What is their other names?
A. Don't know that.
Q. Were they your friends?
A. Yes, sir.
Q. You knew them, but didn't know their names?
A. No, sir; I don't ask names.
Q. How did you get acquainted with them?
A. I am a performer; every one knows me in Kansas City; I bring twelve witnesses to come down from Kansas City.
Q. Have you asked for the persons you call Jim and Bill here?
A. Yes, sir.

Q. Who has refused it?
A. If I had the names would have found them; don't know the next name.
Q. Nor where they work?
A. No, sir; never asked; could not tell; we went to Kelly's saloon.
Q. You went to Kelly's saloon?
A. Yes, sir.
Q. About what hour?
A. Between 8 and 9 o'clock.
Q. Who was in Kelly's saloon?
A. More than half a dozen.
Q. Did you know anybody there?
A. I knew lots of them.
Q. Did they speak to you?
A. Yes, sir; said hello.
Q. Who were they?
A. It is hard to tell.
Q. Don't know where they lived?
A. How can I get it?
Q. Then you went and got some lunch somewhere?
A. Yes, sir; in my own house.
Q. Who was in your house?
A. All by myself.
Q. Nobody there?
A. People was there; didn't see anybody; only one family lived in the house.
Q. What time did you get there?
A. 9 o'clock.
Q. When did you go to bed?
A. After I had supper.
Q. What time did you wake up?
168 A. Half-past five.
Q. When did you discover you had the toothache?
A. At Leavenworth; told it to my daughter.
Q. Did it ache enough to keep you awake?
A. No, sir.
Q. What did you do?
A. Made up my mind to go to work.
Q. Did you?
A. No, sir.
Q. Why not?
A. There was nothing to do. I would not do such work as he wanted me to do; wanted me to do boy's work.
Q. When did he tell you to do boy's work?
A. He didn't say that. He said: "Charley, we will clean up this week."
Q. How did you happen to go to work the next day, then?
A. Well, I didn't bum around.
Q. I thought you said they were going to clean up.
A. That is al' right. I went down there and asked him if I had better go to work.

Q. And you did go to work on Tuesday?
A. Yes, sir.
Q. Then, you didn't go to work Monday because you didn't want to do boy's work and clean up?
A. Yes, sir.
Q. Why did you tell Judge Webb that you didn't go to work because you had the toothache?
A. That is what I went up town for.
Q. Now, will you tell us which it is? You say there is two reasons. You told Judge Webb that you had the toothache, and you told me the reason was because they were going to clean up and you didn't want to clean up.
A. The reason was because I didn't have it pulled, and then I didn't go to work. I got a letter from Mary.
Q. Did you go to have it pulled, and then why didn't you go to work?
A. I had a reason; Mary wanted to see me.
Q. What time did you get the letter?
A. Between 12 and 1 o'clock.
Q. Had your working clothes on?
A. Yes, sir.
Q. And you changed your clothes and missed the five-o'clock train?
A. I missed the five-o'clock train! Who said so? I missed the five-o'clock train! No, sir; never said that.
Q. Didn't you say you went up at eight o'clock?
A. I said I went to the depot and read the letter, and I thought I would not go to work, but come to Leavenworth to-night.
Q. Why didn't you go to work?
A. I thought I would not go to work; it would not be a full day.
Q. Went to work next day?
A. Yes, sir.
Q. You worked these other times up to six o'clock when you went to see Mary?
A. Yes, sir.
Q. Then you went up on the 8-o'clock train Monday night?
A. Yes, sir.
Q. I asked you why you didn't go to work. You say you started to go to work?
A. I told you I got a letter and I would not go.
Q. And you also told us that the other times your work did not interfere with getting the 8-o'clock train.
A. Well, the letter didn't hurt me; I am my own boss.
Q. What did you do after getting the letter?
A. I changed my clothes and went home.
Q. You changed your clothes where?
A. At my house.
Q. What did you do after you changed your clothes?
A. Put good clothes on.
A. What did you do then?
A. Walked around; what they say bumming around; walked down and had a glass of beer.
Q. Where did you go?

A. Down to the bottom.
Q. What did you see there; anybody you knew?
A. Lots of them.
Q. What is their names?
A. How can I tell you. I don't know their names. I know the faces of most of them.
Q. But didn't know their names?
A. No, sir.
Q. Did you know where they worked?
A. No, sir.
Q. How long did you stay at this place, where you didn't know their names?
A. How long? Can I tell how long I staid.
169 Q. Did you stay all afternoon?
A. No; not all afternoon.
Q. How long?
A. Maybe a couple of hours.
Q. Where did you go then?
A. To my home.
Q. What time did you get home?
A. Could not tell; could not tell hours and minutes.
Q. I ask you about what time?
A. About 4 o'clock.
Q. What did you do then?
A. Stayed there at home and read books.
Q. How long did you stay reading books?
A. About after six.
Q. What did you do then?
A. I made ready to go to the depot.
Q. What time did you take the train?
A. I took the old train that I took all the time, 8 o'clock.
Q. You read until six? Did it take until then to get to the train?
A. No, sir.
Q. What were you doing? Where did you stay?
A. I staid in Morris's saloon.
Q. Did they know you there?
A. Yes, sir; knew Mr. Morris; knew me good.
Q. What were the others' names?
A. Didn't know the other people by their names.
Q. Nor where they lived?
A. Mr. Morris lived across the union depot.
Q. And the other people?
A. How can I know it?
Q. Nor where they worked?
A. No, sir; I am no man who wants to know all of something.
Q. What time did you go to the dentist?
A. I told you between 9 and 10 o'clock Monday.
Q. Did you go into the dentist's office?
A. No, sir; was not in the office.
Q. Did you know the dentist's name?
A. No, sir; don't know.

Q. What did you go there for?
A. To pull me tooth.
Q. Did you have it pulled?
A. I had it pulled before.
Q. Did you have any pulled this time?
A. No, sir; I didn't.
Q. Why did not you have your tooth pulled?
A. I went to get a glass of beer first and then it didn't ache so bad; that is reason; it didn't hurt me more; there was the proprietor of the saloon, sir, and if that man should come here would swear right down that I was in his saloon.
Q. He is not here, is he?
A. No, sir; maybe he is here; don't see him.
Q. You went to Leavenworth on the 8 o'clock train?
A. Yes, sir.
Q. When did you first know it was money that Mary gave you?
A. The first I came home to Kansas City; in my room.
Q. What did you do then?
A. Put the money away and went to work.
Q. And you worked all that week until Saturday?
A. Yes, sir.
Q. Then you only worked part of the day?
A. Three-quarters of day; yes, sir.
Q. Then you quit?
A. Yes, sir.
Q. Did you get the money that night?
A. No, sir; did not.
Q. Did you take any of this $400 to Leavenworth when you went up?
A. No, sir; I did not.
Q. Did you have any money when you went up that night?
A. I had lots of money; I had more than twenty dollars; there is plenty witnesses knows I had plenty of money; I would not take poor people's money.
Q. After being at home on this Sunday, the 30th of March, you then went back to Kansas City that night?
A. Yes, sir.
Q. And the next day did you go to work again?
A. There was no work; was laid off.
Q. Did you go down to get your money?
170 A. Yes, sir; I did; got $16 and some cents.
Q. Didn't you see the men were working?
A. Yes, sir; I says to Harris, the time keeper, "Hello, Harris, how is work?" He said, "Charley, there is plenty of work."
Q. Was the shop shut down?
A. Harris told me it was.
Q. Didn't you see the shop?
A. No, sir; was not in it; I went up to the office.
Q. Then you went to St. Joe?
A. Yes, sir.
Q. Did you go that night to St. Joe?
A. Got my money first.

Q. What did you do in St. Joe?
A. Went to machine shops and looked for work.
Q. Did you get it?
A. No, sir; only one man was working.
Q. When did you go to the St. Joe machine shop?
A. On Monday left Kansas City, and went on Tuesday to the machine shop.
Q. What did you do then, when you found you could not get work there?
A. I didn't try no other shop, but thought I would try Kansas City.
Q. You said you staid in St. Joe hunting for work. Didn't get any?
A. No, sir; not at all.
Q. When did you go back to Kansas City?
A. On Wednesday I left St. Joe and went to Kansas City, and Friday to New Y.
Q. Staid there two days and left there Wednesday night; left there, went to Kansas City, and Friday night went to New York?
A. Yes, sir.
Q. And then you went to Philadelphia?
A. No, sir.
Q. What time did you get to New York?
A. I go Saturday to New York.
Q. Do you remember the day of the month?
A. It was in April.
Q. It was the Saturday following the time that you came home from Leavenworth the last time?
A. No, sir; Saturday I came from St. Joe, not Leavenworth.
Q. You was in Leavenworth?
A. Yes, sir.
Q. Then you went to New York?
A. Yes, sir.
Q. How long did you stay in New York?
A. Until 3d July.
Q. Where did you go then?
A. Philadelphia.
Q. How long did you remain in Philadelphia?
A. Until they arrested me.
Q. How was it you got over in Camden?
A. That was my home.
Q. You were living in Camden?
A. Yes, sir.
Q. Rented a house by yourself?
A. Yes, sir.
Q. When did you buy those dogs?
Mr. WEBB. I object; there is no proof that there were any dogs.
COURT. There was nothing brought out in direct examination.
Q. You lived in a house by yourself in Camden?
A. Yes, sir.
Q. You say those revolvers that were shown you were in that house?
A. No, sir; in Philadelphia.
Q. Will you explain how the deputy sheriff, Mr. Pickens, found the revolver in your room in Camden?

A. How can I say I had a revolver in a room in Camden?
Q. Did you have a room in Philadelphia?
A. No, sir; I boarded in Philadelphia and had a house in Camden.
Q. And you went from Camden to Philadelphia to board?
A. Yes, sir; because I worked in Philadelphia.
Q. Did you buy any property while you were there in Camden or Philadelphia?
Mr. WEBB. That is objected to as not material.
COURT. Objection sustained.
Q. What name did you go by in Philadelphia?
WEBB. Objected to as not material nor proper cross-examination.
COURT. Objection overruled.
Q. What name did you go by while in New York, Camden, and Philadelphia?
A. I told you; Arthur Felton.
Q. Did you go by the name of George R. Rowe?
A. No, sir; never my name at all.
171 Q. Did you ever hear of that name before?
Yes, sir; there is a Rowe right here in Topeka.
Q. State to the jury whether or not you received that letter while you have been in confinement.
WEBB. Object to it unless we know first what it is.
COURT. He may state how the envelope is addressed and how the letter is addressed.
Q. State how the envelope is addressed.
A. That is addressed to my name, C. A. Benson.
Q. How is the letter?
A. I don't know how the letter is.
Q. That says Friend Joe. Do you know how they came to call you Friend Joe if your name was Arthur Felton?
WEBB. It is objected to.
Q. Do you know who wrote that letter?
WEBB. It is objected to.
COURT. State if you know.
A. Well, sir, that is very hard to tell.
COURT. If you know, state; if you do not, say so.
A. No, sir; could not swear who wrote that letter.
Q. Then you don't know how they came to call you Friend Joe?
WEBB. Objected to.
A. No, sir; do not know that at all.
Q. Did you ever know a man by the name of N. Arnold in Philadelphia or Camden?
WEBB. Objected to.
COURT. Objection overruled.
A. I know one by Mrs. Arnold, not N.
Q. You know Mrs. Arnold. Did she ever call you Friend Joe?
WEBB. Objected to.
COURT. I don't think I should permit that.
Q. Going back to the fact that you didn't know anything about the killing of Mrs. Mettman, state to the jury why you wrote this: "Old Mettman is innocent of the whole business; he don't know anything about the love affair of his daughter or about the mother?"

WEBB. Wait a minute.
Q. Why did you write this?
A. Who says that I wrote that?
Q. Do you deny that you wrote it?
A. I don't know sure that I wrote it; I don't know whether I did or not.
Q. Did you write that? [Exhibit one shown witness.]
A. I could not swear to that; I could not swear to that piece.
Q. Did you say that you didn't write it?
A. I didn't write that slip.
Q. You didn't write that slip at all?
A. No, sir.
Q. Look at these others; did you write that?
A. I wrote some of them; those letters.
Q. Did you write that?
A. Them slips is not my handwriting at all.
Q. Did you write that that I showed you last; did you write that?
A. I am not sure.
Q. Look at the one I have just handed you.
A. That is not my handwriting.
Q. Did you write them? [Showing witness different slips.]
A. I write a better hand than that; no, sir.
Q. Did you write that [Exhibits 1, 2, 3, 4]?
A. No, sir.
Q. Did you write that [5 and 6]?
A. No, sir.

Redirect examination; Mr. WEBB:

Q. One question I overlooked.

Mr. ADY. As a part of cross-examination we desire to offer these slips that he denied in connection with the letters.

Mr. WEBB:

Q. I hand the witness this saw, the one that was submitted to witness Singleton, and I will ask you if you ever saw that saw before?
A. Yes, sir; here a couple of days before in the court.
Q. Before that had you seen it?
A. No, sir; never saw it.
Q. Do you know Mr. Singleton, the gentleman that testified the other day?
172 A. Yes, sir.
Q. You may state whether he occupied a position in the machine shops.
A. Yes, sir; foreman.
Q. Did you ever remember asking him for the loan of a saw?
A. Yes, sir; to fix my bedstead.
Q. Where was the saw when you asked for it?
A. It was hanging there near him.
Q. Whereabouts was it?
A. In the machine shop.
Q. Whereabouts in the machine shop?
A. Hanging up on a nail.

Q. I will ask you whether you did or did not take the saw?
A. I have used them plenty; yes, sir.
Q. I mean did you take it away from the shop?
A. No, sir.
Q. I will ask you if this is the frame?
A. No, sir; that was an old one. I borrowed it so many times; it was broke inside here [indicating.]
Q. I hand you five saw blades; I will ask you who is the owner of these blades?
A. I could not tell that.
Q. Did you ever have any blades like these?
A. Got several dozen.
Q. How long have you been accustomed to the use of such blades?
A. Over twenty years.
Q. I will ask you whether such saws are used for sawing wood or metals only?
A. No, sir; could not do that. Here, I take it in one finger and break it. [Witness breaks saw.]
Q. Counsel asked you about Bill and Jim, and these other persons. Where have you been since you came back from Camden?
A. Locked up, sir; over eight months.
Q. You have not had any opportunity to go to Kansas City and see these people?
A. No, sir; don't give me a show for that.
Q. Do you know the last name of this man Morris, who keept a saloon?
A. No, sir; always went by Christian name.
Q. How did these men know you?
A. By Charley. I used to perform on Saturday night some. They know me by Charley; don't know Benson at all.

OTHO JONES, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Mr. WEBB:

Q. Give your name?
A. Otho Jones.
Q. Where do you reside; in this city?
A. Yes, sir.
Q. Will ask you if you drive a hack in this city?
A. Yes, sir.
Q. State whether or not you were with Officer Sutton and Mr. Powell and myself last Saturday when we went out to the reservation.
A. Yes, sir.
Q. State if you were there at the time Mr. Sutton measured the distance from the head of the ravine to the fence?
A. Yes, sir.
Q. I want to call your attention to the head of the ravine. State whether or not when there, if there was anything seen in the ravine other than grasses and weeds.
Mr. ADY. If you mean now I object.
COURT. That is rather remote; you need not answer.
No cross-examination.

SANFORD HARRISON, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Mr. WEBB:

Q. Where do you reside?
A. On Broadway in this city.
Q. How long have you lived in Leavenworth?
A. About twenty years.
Q. What is your business?
A. Hauling sand.
Q. Where do you get sand?
A. Above the fort in the Missouri on this side.
Q. Let me ask you if you are acquainted with John Mettman?
A. I have seen him for about ten years I suppose; it has been that long, but I didn't know what his name was until after this court.
Q. You know the man they call John Mettman?
A. Yes, sir.
Q. And have known him ten years?
A. Yes, sir.
173 Q. I will ask you if you saw that man in the month of March, 1890?
A. Yes, sir; I saw him sitting on the side of the road.
Q. Can you fix the time?
A. It was between half past eight and nine.
Q. In the morning?
A. Yes, sir.
Q. I will ask you if you remember the disappearance of Mrs. Mettman and the finding of her body in the river?
A. Yes, sir.
Q. I want to know if you saw that man, John Mettman, in March, either before or after the time that that body was found?
A. This was on Tuesday.
Q. Tuesday before or after?
A. Tuesday before the body was found.
Q. Where did you see him and what was he doing?
A. As I was going to the fort I went up the river bottom, and the road runs this direction [indicating], and, coming down to the river, there is a high bank on this [indicating] side, and he was sitting on this side of the bank [indicating], and as I was going along I noticed him very particularly, but I didn't know his name. The reason I noticed him he seemed to throw his eye into mine, and I didn't know what he was looking at me for so hard.
Q. How close was that to the river?
A. I suppose it was 400 yards.
Q. Do you go by the fort road or the river road?
A. River road.
Q. And how close to the river was the road you traveled; I mean at the point you saw him?
A. I guess it was 400 yards.
Q. When you saw him how far were you from the water?
A. Five or six hundred yards.
Q. How close did you go to him?

A. I was close to him.
Q. Did you speak to him?
A. No, sir; I never said anything to him or him to me.
Q. What was his position?
A. He was sitting down, with his legs hanging down side of the bank.
Q. Did you notice that there was any person with him or near him?
A. No, sir; none at all.
Q. State whether or not you noticed him having anything with him.
A. No, sir; did not.
No cross-examination.

CHARLES LUDWIG HEFFLER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Mr. WEBB:
Q. Mr. Heffler, you now reside in Chicago?
A. Yes, sir.
Q. How long have you resided in Chicago?
A. Four years.
Q. You used to live in Kansas City?
A. Yes, sir; nearly four year in Kansas City.
Q. When did you leave Kansas City?
A. I think I leave there——
Q. When did you go away from Kansas City to Chicago?
A. I tell you——
COURT. He wants to know what time you left Kansas City to go to Chicago.
A. Yes, sir; I am gone in 1890 to Chicago, but I don't know the right day; 11 months.
Q. You have lived in Chicago now this time 11 months?
A. Yes, sir; I think it is 10 or 11 months.
Q. Then you went there in 1890, didn't you.
A. Yes, sir; in 1891 lived in Chicago.
Q. Then you went there in 1890?
A. No, sir; 1889.
Q. What is your trade?
A. Shoemaker.
Q. When you lived in Kansas City where was your shop?
A. West 5th street, next to Broadway.
Q. While you were there carrying on your shop did you see this man [indicating Benson]?
174 A. Yes, sir.
Q. Where did you see him?
A. He came one time and asked me how much to fix half soles; I told him one dollar and he told me he wanted fixed up and said fix them up good and fine and give you quarter more.
Q. You did the work for him?
A. Yes, sir.
Q. And he paid you?
A. Yes, sir; excuse me, the second time he came in and brung the boots or took the boots away and paid me like a gentleman.
Q. Did you see him after that at your place?

A. Yes, sir.
Q. How many times?
A. One time.
Q. When was that?
A. It was a short time after that. My wife played the hand organ and one day I sat down in the shop and my wife played the hand organ and this man came in and I asked his name and he said Charley and he came in and said he was was a good hand to play the organ and I said al'right, give us something, and he took the organ and played on it and we had a couple of glass' of beer.
Q. I want you to tell me if you read in the newspapers or heard about the killing of Mrs. Mettman in this city.
A. Yes, sir; it was after this.
Q. It was after that that you saw the man? I want to know. Did you see this man before or after that?
A. Before this.
Q. How long before?
A. It was about a couple months.
Q. Couple of months?
A. Yes, sir.
Q. How many times was there?
A. I tell you——
Q. How many times at your place?
A. The first time he asked me about the boots and the second time he paid for the boots and then again when he played the organ.
Q. How many times was he there?
A. Four times in all.
Q. Did you see him and talk with him in front of your shop?
A. No, sir; I talked nothing more after that.
Q. Did you see him pass by?
A. No, sir; I seen him one day in a beer store on west Fifth street.
Q. I don't care about that. Did you know him by any other name than Charley or Little Charley?
A. That is the name; yes, sir.
Q. Nothing else?
A. No, sir.
No cross-examination.

Doctor LANE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Mr. DILL:

Q. You are a practicing physician in this city, are you?
A. Yes, sir.
Q. You are also a professor of microscopy, or something of that sort, in the medical college?
A. I have been for the last ten years until last year.
Q. You were subpœnaed as a witness for the Government, were you?
A. Yes, sir.
Q. Doctor, had you exhibited to you for your analysis and examination a specimen of what was supposed to be blood obtained from the Fort Leavenworth military reservation last March a year ago?

A. Yes, sir.
Q. Who submitted those specimens to you?
A. Marshal Murphy or Doane; two of them, I think.
Q. When?
A. Soon after the specimens were collected.
Q. Where?
A. At the police station.
Q. Did you examine them?
A. Yes, sir.
Q. Were there any other specimens submitted to you obtained from other places than on the reservation?
A. Yes, sir.
Q. How many specimens were submitted to you?
A. Six.
Q. Where were the others gotten from?
Mr. ADY. I object unless the witness knows.
A. I don't know where they came from.
Q. You did examine that which was brought from the reservation, did you?
A. Yes, sir; it was said to have come from there.
Q. How large was the specimen?
A. About as large as a pea.
175 Q. Was there any grass on it or about it?
A. No, sir; there was some vegetable formation or decayed grass.
Q. What examination did you make of this specimen?
A. I made a microscopic examination to see if I could find blood.
Q. What was the result of that examination?
A. It appeared to me like blood.
Q. Did you satisfy yourself that it was blood; and, if so, what kind of blood it was?
A. Well, if it was not a case of life and death I would be reasonably satisfied.
Q. Well, we want the result of your examination at that time.
A. I would pronounce it blood.
Q. What kind of blood was it, human blood or the blood of some animal?
A. I don't know.
Q. Were you able to tell from the examination you made whether it was human blood or the blood of some animal?
A. No, sir.

Cross-examination. Mr. ATWOOD:

Q. As a matter of fact the corpi'cles of the blood of animals somewhat resembles that of a human?
A. Yes, sir.
Q. But you never heard of an animal wearing false teeth?
A. No, sir.
Mr. ATWOOD. I withdraw the question.
Defendent rests.

JOHN METTMAN, a witness on behalf of the plaintiff, being recalled in rebuttal, testified as follows:

Mr. ADY:

Q. Mr. Mettman, were you in here yesterday when Mr. Kelly testified?
A. Yes, sir.
Q. You observed that he testified that he saw you going or coming out of the reservation with a package or bundle on Tuesday morning after your wife disappeared?
A. Yes, sir.
Q. You may state whether you were there or not?
A. I was not there.
Q. You heard Mr. Harrison, the colored man who just left the stand?
A. Yes, sir.
Q. And who stated that he saw you four, five, or six hundred yards from the river, on the side of a bank, between 8 and 9 o'clock? Were you there?
A. I was not.
Q. Is that the morning that you went down to the train to meet your son Henry, Tuesday morning?
A. Yes, sir.
Q. You went to the Union depot and met him there?
A. Yes, sir.
Q. About what hour?
A. About 20 minutes past eleven.
Q. What time did you go down there that morning?
A. I arrived there at half-past eight and staid until 20 minutes past eleven.
Q. What time should the train arrive?
A. I think 9:20 or 9 something.

C. FLORA, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Mr. ADY:

Q. Your name is what?
A. C. Flora.
Q. You reside in Leavenworth?
A. Yes, sir.
Q. How long?
A. About 33 years.
Q. What is your occupation and position?
A. Sheriff of this county.
Q. Do you know Mr. Benson?
A. Yes, sir.
Q. Do you remember having some conversation with him after he returned from Camden, N. J.?
A. Yes, sir; I had a conversation with him several times.
Q. At the time that you had these conversations were you offering him any inducement to make a statement?

A. No, sir.

Q. Were you threatening him or have him under duress in any way?

A. No, sir; the first conversation I had with him was on the train between Kansas City and here.

Q. Was that conversation voluntary on his part?

A. Yes, sir; altogether.

Q. What statement, if any, did Benson make to you about having kept several savage dogs in Trenton, or Camden, N. J.?

Mr. WEBB. I object; it is not rebuttal in any sense.

COURT. Objection sustained.

Government rests in rebuttal.

And thereupon, after the case had been argued by counsel, the court instructed the jury in writing as follows:

177 *Charge to jury.*

Gentlemen of the jury, the indictment in this case is brought under section 5339 of the Revised Statutes of the United States, which provides that any person who maliciously strikes, wounds, poisons, or shoots at any other person within any place under the exclusive jurisdiction of the United States, of which striking, wounding, or shooting such other person dies, shall be deemed guilty of murder. If you find from the evidence in this case that a crime has been committed, and that it was committed at the place mentioned in the indictment, namely, on the Fort Leavenworth military reservation, then I charge you that it was committed at a place under the exclusive jurisdiction of the United States and within the jurisdiction of this court. The indictment charges this defendant, Charles A. Benson, and Mary Rautzahn jointly with the crime of murder. A separate trial has been ordered in this case, and you will, therefore, only consider the case so far as it relates to the defendant now on trial, Charles A. Benson, and determine the question of his guilt or innocence from the evidence given on the trial of the cause.

In the trial of a criminal cause of this character two distinct propositions are involved: First, was the act itself done; that is to say, was the person alleged to have been killed in fact killed. Second, was it done by the person or persons charged in the indictment and by none other. In other words, there must be proof of the death of the person alleged to have been killed; second, proof of the identity of the defendant. In considering these questions, therefore, you will ascertain from the evidence, first, whether or not a crime was committed at the place mentioned in the indictment. Second, whether the person alleged in the indictment to have been killed is in fact dead, and third, the identity of the defendant. Before proceeding to the consideration of the last proposition necessary to be determined by you as above suggested, I deem it advisable to call your attention to some rules of law which must necessarily govern you in the investigation of that question, namely, whether or not the defend-

178 ant now on trial, Charles A. Benson, committed the offence charged in the indictment, or, being present, aided, consented to, or assisted in the commission of the offence to such an extent as to make him a principal, as will be hereafter explained, and in order that you may more

clearly understand the nature of the evidence I desire to call your attention at this time to a distinction, which must be borne in mind by you in your investigations, between a civil and a criminal case with respect to the degree or quantity of evidence. In a civil case the law requires that you shall weigh the evidence carefully and find for the party in whose favor there is a preponderance of evidence, although it be not free from reasonable doubt, but in criminal causes a very different rule applies. The party accused is entitled to the benefit of the legal presumption of innocence. This the law gives him, and you, in your deliberations, must accord him. In doubtful cases this presumption is always sufficient to turn the scale in the defendant's favor, for it is an inflexible rule of the criminal law that the guilt of the accused must be fully proved; neither a preponderance of the evidence nor any weight of preponderant evidence is sufficient for the purpose unless it generate full belief in your minds of the fact to the exclusion of all reasonable doubt.

Having called your attention to the distinction between civil and criminal causes as to the degree or quantity of evidence we come now to consider the question, what is understood by the term "reasonable doubt?" A reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to the same possible or imaginary doubt. A reasonable doubt, I may say, is that state of the case which, after comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All of the presumptions of law independent of the evidence given on the trial of the cause are in favor of innocence, and every person is presumed to be innocent until his guilt is established by the evidence If, upon such proof, there is a reasonable doubt remaining in your minds, the ac-
179 cused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, although a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those bound to act conscientiously upon it. This is proof beyond a reasonable doubt, because if the law, which must depend upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether. A reasonable doubt is a doubt arising in the mind of the jurors after the consideration of all the evidence in the case and arising out of the evidence.

You are the judges of the weight of the evidence and the credibility of the witnesses. It is your duty, if possible, to harmonize the evidence upon the theory of innocence if that can be done. The facts must be consistent with each other and with the main fact sought to be proved. Before you can return a verdict of guilty you must be satisfied beyond a reasonable doubt, as defined in these instructions, of the conclusive nature of the charge against the accused. In other words, the circumstances taken together must be of a conclusive nature, producing in your minds a reasonable and a moral certainty that the accused committed the offence charged in the indictment.

The law makes the defendant a competent witness in his own behalf and you are the judges of the weight which ought to be attached to his testimony, and in considering his evidence you should take into consideration all the facts and circumstances surrounding the case as disclosed by the evidence, and give the defendant's testimony only such weight as you believe it entitled to in view of all the facts and circumstances proved on the trial. Although the law gives the defendant the right to be sworn and to give evidence in his own behalf, still his credibility and the weight to be attached to his evidence are matters exclusively for you. His interest in the result of the trial is a matter which you may properly take into
180 consideration in determining what weight should be given to his testimony.

As already suggested, a seperate trial has been ordered in this case and you are to only consider the case so far as it implies to the defendant now on trial, Charles A. Benson, he being indicted jointly with Mary Rautzahn. I wish to explain to you that it is for the court to determine whether or not the defendants shall be tried jointly or seperately, and that a seperate trial has been ordered in this case; the trial, therefore, of this defendant does not any way affect the case so far as it relates to Mary Rautzahn. It does not determine in any degree the question of her guilt or innocence, but leaves her case to be yet tried or otherwise disposed of the same as if she had been indicted alone.

It also suggested at the outset that your inquiry on this trial was confined to the investigation of the question of whether or not Charles A. Benson committed the offence charged in the indictment. If you shall find that an offence has been committed, or that he assisted or aided in its commisssion to such an extent as to make him a principal, and, in order that you may fully understand what I mean by the term aided, consented, and assisted in the commission of the offence, it may be profitable for me to explain to you at this point that the law is, that one who stands by and aids, abbets, or assists is a principal, and is to be punished accordingly. In other words, by reason of his acts, he becomes in law a principal in the commission of the offence.

With these suggestions as to the general rules by which you are to be guided in the consideration of the evidence, we are now prepared to take up for consideration the third proposition stated at the outset. The indictment charges that this defendant and another on the 23d day of March, 1890, feloniously, wilfully, and of his malice did kill and murder Theresa Mettman. The time alleged in the indictment, while it is a fact to be shown by the evidence, is not material, except that you must find from the evidence that it was prior to the finding of the indictment. The indictment alleges that the killing was maliciously done. This it is necessary for you to find from the evidence before you can find a ver-
181 dict of guilty, as it is only where the killing is done with malice that it constitues the crime of murder. Malice, however, may be shown, first, by proof of death; second, that it was done with a dangerous or deadly weapon—as, for example, my means of a gunshot wound, or pistol shot, or by striking a person with a rock or any hard substance with such force as to produce death. A man is presumed to intend the consequences. Hence, if it is shown by the evidence that the person alleged in the indictment to have been killed is dead, and that she came to

her death by means of a gun or pistol shot wound, or by reason of a blow inflicted by means of any hard substance, with sufficient force to cause death, then the law presumes and the presumption is conclusive, if unexplained, that the person who caused the death did it maliciously. Hence, if you find from the evidence in this case that the deceased came to her death at the hands of this defendant in either of the ways mentioned in the indictment, then you are instructed, in the absence of any satisfactory explanation, that the presumption of law is, that it was done with malice, and the Government in its proof of the allegation of malice mentioned in the indictment need go no further than to show those facts, or either of them. As bearing upon the question of the identity of the defendant, it is always pertinent to inquire whether or not there was opportunity to commit the crime. In other words, was this defendant in a position, or in such proximity to the place, that he could have committed the offence charged. If you find from the evidence that he was so situated, then you will next consider whether he had the means by which he might have committed the offence. If you find from the evidence that he was so situated with reference to the locality of the crime that he could have committed the offence charged and that he had the present means, you will investigate the facts and circumstances as detailed in the evidence occurring before and after the death of the deceased as bearing upon the question of the defendant's guilt.

It has been the history of human experience that men who commit crimes of the nature here charged do not do so openly. Hence, in the prosecution of these cases the Government is almost invariably forced to es-
182 tablish its case by what is known as circumstantial evidence. Circumstantial evidence is in the abstract nearly, though not perhaps not altogether, as strong as positive evidence. In the concrete it may be infinitely stronger. A fact positively sworn to by a single eye witness may not be so satisfactorily proved as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses. The only difference between positive and circumstantial evidence is that the former is more immediate and has fewer links in the chain of connection between the premises and the conclusion. A witness may as well swear falsely to absolute knowledge of a fact as to a number of facts, from which, if true, the fact on which the question of guilt or innocence must necessarily turn. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not, therefore, to stop its wheels. I may say that all evidence is more or less circumstantial, the difference being only in the degree, and it is sufficient for the purpose when it excludes disbelief, that is actual and not technical disbelief, for you who have to pass upon the question are not at liberty to disbelieve as jurors while you believe as men. The law exacts a conviction where there is legal evidence to show the guilt of the defendant beyond a reasonable doubt, and circumstantial evidence is legal evidence. If, therefore, the evidence in this case convinces your minds beyond a reasonable doubt that the defendant killed the deceased, although there has been no eye witness of the fact, you are bound to find him guilty, for, if the proof so satisfies you you have no discretion and no dispensing power; your oath makes the law your only guide to your verdict. You are not to look to its consequences or the punishment which may result. You find

only whether or not an offence has been committed such as defined in the law, and you must be governed by the same rules of evidence, regardless of the question of punishment. It is for the legislative department of the government to prescribe the punishment of offences, and it is not for you or for the court to arraign their justice or wisdom in performing our
183 respective duties in the administration of justice. We must go in the safe road prescribed by the laws as their expounders, but without assuming the power to repeal, alter, dispense, or annul their provisions. We cannot vary the rules of evidence in their application to the offence of a greater or less degree. They are the same, regardless of the question of punishment. No man can be convicted of a criminal offense excepting upon clear and satisfactory proof of guilt. The evidence must be the best the nature of the case and the ability of the party admits of, and the law must meet the evidence and the case, and if, in the opinion of the jury, the case is here made out it is your duty to so find. Obedience to the law is as much the duty of the citizen in the jury box as out of it. The juror violates every duty if, when his reason and judgment are entirely convinced of the guilt of the accused, he acts against such conviction from feelings of humanity merely arising from the nature of the punishment. He does not, in the words of his oath, a true verdict give according to the law and the evidence. The degree of the punishment cannot alter the weight of the evidence or the meaning of the words of the law, and you as jurors are bound to render your verdict according to these alone, be the crime or its punishment what it may.

The questions, then, to be considered by you are:

First, is the person alleged in the indictment to have been killed in fact dead?

Second, did she come to her death in either of the ways described in the indictment?

Third, was the offense committed on the Fort Leavenworth military reservation?

Fourth, did this defendant commit the offense, or assist at its commission?

If, after a consideration of the evidence, you can answer these questions in the affirmative, your duty is plain to say so by your verdict of guilty. If, on the other hand, you have a reasonable doubt as to either of these propositions arising in your minds from a consideration of the evidence
184 in the case, you must acquit, but, as already suggested, the doubt must be reasonable; that is, an honest doubt arising from the consideration of all the evidence in the case. It must not be a doubt about the policy, justice, or binding power of the law, or in any way growing out of the degree of punishment which may follow a conviction.

In case you find the defendant guilty the form of your verdict will be:

In the circuit court of the United States for the district of Kansas.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZAHN. } No. 6620. Indictment for murder.

We, the jury in the above-entitled case, duly empanelled and sworn, upon our oaths find the defendant, C. A. Benson, guilty as charged in the indictment (or in any one count in the indictment, if you shall so find). Foreman.

In case you find the defendant not guilty you will insert in your verdirt the word "not" between the words Benson and guilty, so that the verdict will read: "We, the jury in the above-entitled cause, find the defendant not guilty as charged in the indictment."

With these instructions as to the law by which you are to be guided the case is submitted to you.

To which instructions, and to the whole of them, and to each instruction separately, the said defendant, by his counsel, then and there excepted, and still except; and afterward the said jury returned a verdict finding said defendant guilty as charged in the first count of the indictment, which verdict is in words as follows:

185 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES
vs.
C. A. BENSON AND MARY RAUTZAHN. } Indictment for murder.

We, the jury in the above entitled cause duly empanelled and sworn, upon our oaths find the defendent, C. A. Benson, guilty of murder as charged in the first count of the indictment, and not guilty upon the second and third counts as charged in the indictment.

B. F. MILLER, *Foreman.*

No. 6620. The United States vs. C. A. Benson and Mary Rautzahn.

Verdict filed June 16, 1891. Geo. F. Sharitt, clerk.

And afterward at said June term, 1891, the defendant filed his motion for a new trial in words as follows:

186 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES,
against
C. A. BENSON. } No. 6620. Motion for new trial.

Now comes said defendant and moves the court to set aside the verdict heretofore and at this term and herein returned against him, and to grant a new trial of this cause, upon the grounds:

1st. The court erred in allowing Johanna Benson, the wife of this defendant, to testify herein on the part of the Government.

2d. The court erred in allowing Mary Rautzahn, the codefendant jointly indicted with this defendant as a principal, to testify on the part of the Government, no judgment having been given either for or against her on said indictment, and no dismissal of the case having been made as to her.

3d. Said Johanna Benson was not a competent witness to testify on the trial hereof respecting or concerning any communications made to her by her husband, the defendant herein.

4th. Said Mary Rautzahn was not a competent witness on the trial of this cause.

5th. The district attorney was guilty of misconduct at the trial, greatly to the prejudice of this defendant.

6th. The verdict is contrary to law and is not sustained by sufficient evidence.

7th. For newly discovered evidence, material to the issues, which could not have been discovered with reasonable diligence prior to the commencement of the trial.

W. C. WEBB and WM. DILL,
Att'ys for Def't Benson.

No. 6620. The United States agst. C. A. Benson. Motion for a new trial. Filed June 13, 1891. Geo. F. Sharitt, clerk.

And afterward said defendant filed his motion in arrest of judgment, in words as follows:

187 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES *against* C. A. BENSON. } No. 6620. Motion in arrest of judgment.

Comes now said defendant, after verdict herein, and moves the court to arrest judgment upon said verdict, for the reasons and upon the grounds.

1st. The indictment herein does not state facts sufficient to constitute a a public offence against the laws of the United States.

2d. This court has no jurisdiction of or over the supposed offence set forth in said indictment.

3d. The verdict of not guilty as to the second and third counts of the indictment operate as (and in judgment of law is) an acquittal upon the first count of said indictment also.

W. C. WEBB and WM. DILL,
Att'ys for Defendant C. A. Benson.

No. 6620. The United States agst. C. A. Benson. Motion in arrest of judgment. Filed June 18, 1891. Geo F. Sharitt, clerk.

And said motions for a new trial and in arrest of judgment were, respectively, brought on for hearing and were, respectively, overruled, to which rulings and decisions said defendant duly excepted; and the orders made by said court overruling said motions, and defendant's exceptions thereto, were duly entered of record on the journal of said court.

188 And inasmuch as the said several matters so produced and given in evidence on the part of the plaintiff, the United States of America, and as the question as to the competency of said witnesses, and each of them, to testify, and as the said instructions so given by said court to the jury at said trial, and the objections and exceptions thereto made by said C. A. Benson, defendant, by his said counsel, do not appear of record in said cause, the said counsel for said defendant do now propose and present this bill of exceptions to the judge before whom said cause was tried as aforesaid, and request that the same may be allowed and signed as provided by law. And thereupon the said judge at the request of said counsel hath signed the same as requested this 28th day of October, A. D. 1891.

JOHN A. RINER, *Judge.*

(Endorsed:) No. 6620. U. S. vs. Benson et al. Bill of exceptions. Filed Oct. 30, 1891. Geo. F. Sharitt, clerk.

189 In the circuit court of the United States for the district of Kansas, first division.

THE UNITED STATES OF AMERICA, *against* C. A. BENSON (IMPLEADED WITH MARY RAUTZAHN) defendant.	No. 6620, indictment for murder.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, C. A. Benson most respectfully represents that in a certain criminal cause, tried and determined in the circuit court of the United States for the district of Kansas, first division, wherein the United States was plaintiff, and your petitioner, C. A. Benson, impleaded with one Mary Rautzahn, was defendant, your petitioner was by the verdict of a jury and the judgment of said circuit court convicted of the crime of murder alleged to have been committed on the Fort Leavenworth military reservation in the County of Leavenworth on the 23d of March, 1890, as charged in the indictment jointly found and preferred against your petitioner and said Mary Rautzahn; and your petitioner was by the judgment of said court sentenced to suffer death for said supposed offense, and your petitioner is still under such sentence.

And your petitioner further represents, that there are manifest errors in the record and proceedings in said cause in said circuit court, which errors are specifically assigned and numbered, and hereunto appended; and your petitioner desires that said errors may be examined and corrected by your honors, and that your honors may adjudge what of right and according to the laws and customs of the United States should be done therein in the premises.

190 Wherefore your petitioner prays that your honors may award and issue a writ of error from your honorable court directed to the honorable judges of said circuit court of the United States for the district of Kansas, first division, commanding them to send to your honorable court the record and proceedings aforesaid with all things concerning the same, together with said writ, and that your honorable court may examine and consider the same and pronounce judgment thereon as is right and proper.

C. A. BENSON,
Defendant and Petitioner.
By W. C. WEBB
and WILLIAM DILL,
His Attorneys.

Assignment of errors.

In the above-entitled proceedings in error from the circuit court of the United States for the district of Kansas, first division, the petitioner, C. A. Benson, makes the following assignment of errors.

1st. The said circuit court, page 12 of transcript, erred in overruling the demurrer to the indictment, in this: The indictment in each of its three counts, charges or states the locus in quo as follows:

"The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire of offenses committed within the first division

of the said district of Kansas, upon their oaths, do find and present, that C. A. Benson and Mary Rautzahn, whose more full Christian names are to the grand jurors aforesaid unknown, late of the district of Kansas, and of the first division of said district of Kansas, on or about the 23d day of March, in the year of our Lord one thousand eight hundred
191 and ninety, at the Fort Leavenworth military reservation, in the district of Kansas aforesaid, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force and arms," &c. (Pages 3, 5, and 7 of transcript.)

Whereas, said "Fort Leavenworth military reservation" is a body of land comprising about 3,500 acres, and was not "purchased by the consent of the legislature" of Kansas "for the erection of any fort, magazine, arsenal, dock-yard, or other needful building," nor used by the United States for any or either of said purposes, nor does said indictment allege or state that said "reservation" was so purchased, nor that it was or is so used or occupied by the United States; nor is such "Fort Leavenworth military reservation" a place or district of country "under the exclusive jurisdiction of the United States," as alleged in said indictment.

2d. Said circuit court (page 9 of the transcript) erred in ordering separate trials to the defendants C. A. Benson and Mary Rautzahn at the instance and on the motion of the United States district attorney—said defendants having been jointly indicted, and charged jointly as principals in each count of the indictment, and neither of them having moved for a severance.

3d. Said circuit court erred (pages 26 to 28 of the record) in permitting Mrs. Johanna Benson to testify as a witness for the Government and against defendant C. A. Benson, she being the wife of said defendant, and objection being duly made on the ground of her incompetency as such witness.

4th. Said circuit court also erred (pages 26 to 28 of the record) in permitting said Johanna, wife of said C. A. Benson, to testify respecting certain written communications made by him to her during the exist-
192 ence of their marriage relation, objections thereto being duly made on the ground of her incompetency as such witness.

5th. Said circuit court also erred in overruling the motion to strike out the testimony of said Johanna Benson, said motion being made on the ground that her testimony was incompetent (page 48 of the transcript).

6th. Said circuit court erred in refusing to allow the jury to go upon the "Fort Leavenworth military reservation" to inspect the grounds where the alleged murder was supposed to have been committed, and thence to the place where the body of the deceased was found. (Record, pp. 90 and 140; and for descriptions, and location, and distances, showing necessity and propriety of a personal view by the jury, see testimony of James Barry, pp. 50 and 59; testimony of George Sutton, page 62; and testimony of Henry Schindler, pp. 84, 85, and 86.)

7th. Said circuit court erred in permitting Mary Rautzahn, the co-defendant of said C. A. Benson, to testify as a witness for the Government, she, the said Mary Rautzahn, being jointly indicted with said Benson, and

charged as a principal jointly with him in each of the three counts of the indictment (transcript, pages 3, 5, 7, and 180), which indictment was still pending and undisposed of as against her, and objection to her competency as such witness being duly made. (Transcript, page 105.)

8th. Said circuit court erred (record, page 122) in arbitrarily and of its own motion arresting the cross-examination of Benson's co-defendant, Mary Rautzahn, respecting conversations occurring in the jail between herself and her father, it having been already shown (page 32) that her father, John Mettman, and herself (page 113) had both been accused of the crime of killing said Theresa Mettman, who was the wife of said John
193 and the mother of said witness, no objection being made or suggested by the district attorney to such cross-examination, and such cross-examination being calculated to discredit the testimony of said Mary Rautzahn as a witness for the Government.

9th. Said circuit court also erred in arbitrarily and of its own motion arresting the cross-examination of said Mary Rautzahn as to conversations had between herself and the witness James Doane, because "time and place" were not fixed in the questions (record, pages 123 and 124), such cross-examination being competent and calculated to discredit the testimoney given by said witness for the Government.

10th. Said circuit court erred in admitting in evidence the papers marked Exhibits A and B, and Exhibits one, two, three, four, five, and six (appearing in the record at pages 136, 137, 138, and 139), being letters and papers alleged to have been written by defendant, Benson, to his wife (pages 26, 27, and 28), and if written by defendant, Benson, being communications made by a husband to his wife during their marriage relation, and incompetent as evidence against him.

11th. It was also error to admit such Exhibits A, B, one, two, three, four, five, and six to be read in evidence, their genuineness not having been proved either collectively or separately by competent testimony.

12th. Said circuit court erred in refusing to allow defendant, Benson (page 162), when testifying respecting certain clauses in the letters alleged to have been written by him to his wife, to state, in explanation of the clause "she can live in incest with her old man," whether Mary Rautzahn, his co-defendant, had told him that she had been living in incestuous relation with her father.

194 13th. Said circuit court erred in its charge or instructions to the jury, in this, to wit: In stating to the jury (in substance) that the "Fort Leavenworth military reservation" was a place under the exclusive jurisdiction of the United States, and within the jurisdiction of said circuit court. (Transcript, pages 177, 183.)

14th. Said circuit court erred (transcript, pages 22 and 186) in overruling the motion for a new trial, the first, second, third, and fourth grounds thereof, respectively, presenting error occurring at the trial, to which defendant, Benson, had duly excepted.

15th. Said circuit court erred (transcript, pages 22 and 187) in overruling the motion in arrest of judgement, each of the three grounds therein stated presenting matter sufficient to require that judgement, on the verdict be arrested.

16th. Said circuit court erred in giving judgement on the verdict of the jury, and pronouncing sentence of death against the defendant, Benson

(record, pages 22 and 23), because by said verdict (transcript, pages 20 and 185) said defendant was found "not guilty" upon the second and third counts of the indictment, the first and second counts thereof being precisely alike except that the word "head" occurs twice in the first count (pages 3 and 4 of the record), and said word does not occur in the second count (record, pages 5 and 6), while the word "neck" occurs twice in the second count, and does not occur in the first count; and no testimony was given or found in the record which would not as well sustain the second count as the first count; and the verdict of "not guilty" upon the second count was and is in judgment of law a verdict of "not guilty" upon the first count also.

W. C. WEBB,
WILLIAM DILL,
Attorneys for C. A. Benson, petitioner.

195 (Endorsed:) No. 6620. U. S. vs. C. A. Benson. Petition for writ of error & assignment of errors. Filed Dec. 9, 1891. Geo. F. Sharitt, clerk.

196 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings had in said court in the action of the United States of America vs. C. A. Benson and Mary Rautzahn, No. 6620 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 9th day December, A. D. 1891.

[SEAL.] G. F. SHARITT, *Clerk.*

197 UNITED STATES OF AMERICA, *ss:*

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error, filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein C. A. Benson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

DAVID J. BREWER,
Associate Justice Supreme Court U. S.

198 On this day of , in the year of our Lord one thousand eight hundred and ninety- . , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

Sworn to and subscribed the day of , A. D. 189 .

Service hereby acknowledged and accepted this 4th day of January, 1892.

J. W. ADY,
U. S. Atty, Dist. of Kansas.

199 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, and C. A. Benson (impleaded with Mary Rautzahn), defendant, a manifest error hath happened, to the great damage of the said C. A. Benson as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice Supreme Court, U S.

200 *Return to writ.*

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Topeka, this 5th day of January A. D. 1892.

[SEAL]

GEO. F. SHARITT,
Clerk of said Court.

(Indorsement on cover:) Case No. 14963. Term No. 1489. C. A. Benson (impleaded with Mary Rautzahn), plaintiff in error, *vs.* The United States. Kansas, C. C. U. S. Filed January 14, 1892.

1007 146 0

No. 14,963.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OF THE OCTOBER TERM 1891.—TERM No. 1[illegible]

C. A. BENSON (IMPLEADED WITH MARY RAUTHAPP),
Plaintiff-in-Error,

AGAINST

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE U. S. FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF-IN-ERROR.

A. L. WILLIAMS,
LELAND J. WEBB,
Attorneys for Plaintiff-in-Error.

W. C. WEBB, Topeka,
WM. DILL, Leavenworth,
Of Counsel.

Geo. W. Crane & Co., Topeka, Kas.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Topeka, this 5th day of January A. D. 1892.

[SEAL.]

GEO. F. SHARITT,
Clerk of said Court.

(Indorsement on cover:) Case No. 14963. Term No. 1489. C. A. Benson (impleaded with Mary Rautzahn), plaintiff in error, *vs.* The United States. Kansas, C. C. U. S. Filed January 14, 1892.

1007 146 U.S. 325

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

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AGAINST

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE U. S. FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF-IN-ERROR.

MAY IT PLEASE THE COURT:

Plaintiff-in-error C. A. Benson stands convicted, and is under sentence of death, for the alleged felonious killing of one Teresa Mettman. His trial took place at Leavenworth in June 1891, before the circuit court for the district of Kansas. The indictment contains three counts, and is set forth in full in the original record at page 2, and in the printed record at page 1. [As the index to the *printed record* gives the pages of the original transcript, and also the pages of the printed record, citations hereaf-

ter made to the "record," will for convenience be the pages of the printed record alone.]

So much of the indictment as is material for the purposes of this argument is as follows:

First Count.—"At the term of the district court of the United States in and for the said first division of said district, begun and held on the 13th of October 1890, the grand jurors of the United States, duly impaneled, sworn, and charged to inquire of offenses committed within the first division of the said district, upon their oaths do find and present, that *C. A. Benson and Mary Rautzahn*, late of the District of Kansas, and of the first division of said district, on or about the 23d of March 1890, *at the Fort Leavenworth Military Reservation, in the District of Kansas aforesaid*, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of this court, with force and arms, in and upon the body of one Teresa Mettman, then and there being, feloniously, willfully, and of their deliberately premeditated malice aforethought did make an assault, and that the said *C. A. Benson and Mary Rautzahn*, with a certain revolving pistol, a more particular description of which is to the grand jurors aforesaid unknown, then and there charged with gunpowder and leaden bullets, which said revolving pistol they the said *C. A. Benson and Mary Rautzahn* in *their hands* then and there had and held, then and there feloniously, willfully, and of their deliberately premeditated malice aforethought did discharge and shoot off to, against, and upon the said Teresa Mettman, and that the said *C. A. Benson and Mary Rautzahn*, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said C. A. Benson and Mary Rautzahn discharged and shot off as aforesaid, then and there feloniously, willfully, and of their deliberately premeditated malice aforethought did strike, penetrate and wound her the said Teresa Mettman, in and upon the left side of the *head* of the said Teresa Mettman about two inches posterior to the left ear of her the said Teresa Mettman, giving to her the said Teresa Mettman then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the revolving pistol aforesaid by the said *C. A. Benson and*

Mary Rautzahn, in and upon the left side of the *head* of her the said Teresa Mettman, one mortal wound," etc., "and so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said *C. A. Benson and Mary Rautzahn*, her the said Teresa Mettman, in the manner and by the means aforesaid, feloniously, willfully and of their deliberately premeditated malice aforethought, did kill and murder," etc.

The 2d count of the indictment is precisely like the first count, except that it alleges that the wound was inflicted in and upon the left side of the *neck* of said Teresa Mettman. The 3d count alleges the same offense, except that it charges that the assault was made "with a certain dangerous weapon, to-wit, a sandbag, club, or other blunt instrument," and that the wound was inflicted upon *the back part of the head* of said Teresa Mettman. Each count charges willful, deliberate, and premeditated malice, and alleges that death resulted from the wounds inflicted.

ASSIGNMENTS OF ERROR.

The assignments of error presented to this court with the application for a writ of error, will be found in the printed record at pp. 235 to 238. In considering the questions raised upon these assignments it will be convenient to examine several under one head. The assignments numbered 1st, 14th and 15th go to the jurisdiction of the court, and will be considered together.

THE QUESTION OF JURISDICTION.

The second ground of the demurrer alleges the want of jurisdiction of the United States courts over the supposed offense. The words used in each of the three counts in the indictment which attempt to show that the offense was committed within the jurisdiction of the federal court are as follows:

—"At the Fort Leavenworth Military Reservation in the District of Kansas aforesaid, and within the first divi-

sion of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States, *and within the exclusive jurisdiction of this court.*"

The *locus in quo* is designated only by the words, "at the Fort Leavenworth Military Reservation."

This court will take judicial notice of the public lands of the United States and of Military Reservations, as well as of "forts, arsenals, dockyards, and magazines," and the place of their respective location, or of any other "place or district of country under the exclusive jurisdiction of the United States," in order to determine the question whether any particular offense is committed "at a place within the exclusive jurisdiction of the United States." What we claim is, that the "Fort Leavenworth Military Reservation" is not a place or district of country within the exclusive jurisdiction of the federal courts. The status of this Military Reservation has been settled by repeated decisions of the courts, both state and federal. But let us first see what and how large this "Reservation" is.

THE "RESERVATION"—ITS SIZE, ETC.

Much public history relating to this Reservation will be found in the case of *United States v. Stone*, 2 Wal. 525. A site "for a military cantonment" was selected in 1827 which was within the present "reservation." In 1830, pursuant to a "Senate resolution" one McCoy made a survey of the Reservation, and reported that the land reserved embraced "a tract of six miles on the Missouri river, and four miles back"—that is, 24 sections, or 15,860 acres. In 1839 another survey was made by Capt. A. R. Johnson, by which the western boundary was changed, taking a natural boundary instead of the line run by McCoy. In 1854 under a survey made by Capt. Hunt under orders of the War Department the reservation was reduced in width from six miles to two and three-quarter miles—leaving the area of the reservation about 16 sections, or 10,240 acres.

A brief history of the "Fort Leavenworth Military Res-

ervation," compiled from official sources, covering matters not stated in the Stone case, *supra*, will be found at pages 269 and 270 of the Report of the Kansas State Board of Agriculture for 1877–8. This "history," enlarged a little by reference to the several acts of congress referred to, shows the following facts:

"The first reserve known in the Adjutant General's office, as having been declared by the President, is of date June 21st 1838. The land held as reserved extends from six to seven miles along the Missouri river, and varies from one to two miles wide, and contains about 6,840 acres." * * *

In 1868 congress passed three acts relating to Fort Leavenworth Military Reservation, as follows:

Act of 20th July 1868, authorizing a sale of 20 acres of the Reservation in the southeast corner, next the river, to the Leavenworth Coal Company.—(15 U. S. Stat. at Large, chap. 199, p. 392.)

Act of 27th July 1868, granting right-of-way 100 feet in width to Leav. & Des Moines Rly. Co., "to construct and operate a railway across the Military Reservation," etc.; and granting right-of-way 100 feet in width to Leav., Atchison & N. W. Rly. Co., "to construct and operate a railroad across and over the Military Reservation," etc. (15 U. S. Stat. at Large, chap. 268, p. 238.)

Act of 27 July 1868, setting apart a strip of land 100 feet in width along the southern boundary of the Military Reservation, from the Missouri river to the western boundary thereof, for perpetual and exclusive use as a public road. (15 U. S. Stat. at Large, ch. 269, p. 238.) This "road" is known as Metropolitan Avenue.

In February 1871 congress passed Joint Resolution No. 23, authorizing the Kansas Agricultural and Mechanical Association to purchase from the U. S. for use as Fair Grounds 128.82 acres near the southwest corner of the Reservation. (16 U. S. Stat. at Large, p. 594.)*

The Quartermaster General made a report to the Secre-

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*In 1868—24 U. S. Stat. at Large, ch. 622—congress granted the right-of-way, 100 feet wide, over and across the Reservation to the Leav., Northern & Southern Rly. Co. And in 1889—25 U. S. Stat. at Large, page 863—congress authorized the Secretary of War to lease to the Leavenworth Water Company 9¾ acres of the Reservation, adjoining the tract sold to the Coal Company.

tary of War under date of 4th December 1871 in which he says:

"The state [Kansas] was admitted to include all territory within certain boundaries except certain Indian Lands. * * * I fear therefore, that the United States has ceded away its exclusive jurisdiction over the reservation. * * * Whether, under the constitution,† the reservation of this land as a site for a military fort and buildings, takes it out of the effect of the law of 1859, I am not able to decide." * * *

The "history" of the "Reservation" found in the "Report" above mentioned is supplemented by the following paragraph written by a local historian, (Report of Kansas State Board of Agriculture, for 1877–8, page 270):

"*In addition* to that portion of the reservation occupied *by the fort proper*, there are *two large farms*—the upper and lower—the one *above the post*, north, in the bottom, and the one south. * * * There are three railroads passing across the Reservation—the Leavenworth, Atchison & Northwestern, running along the west bank of the Missouri river, across the Reservation north-and-south; the Rock Island & Pacific, entering the Reservation from the east, near the post, over the great iron bridge which spans the Missouri river; and the Kansas Central, which enters the Reservation at the southeast corner, on the river, and meanders northwest through the lower farm. The Reservation lies immediately north, and adjoining the city of Leavenworth. *The post or Fort lies about two miles north of the city.* A splendid macadam drive connects the two points."

Deducting the lands included in the railroad rights-of-way and Metropolitan avenue, and sales to the coal company, and for fair grounds, and there remained of this "Military Reservation," in 1890, something over 6,500 acres—*or more than ten sections of land.* The lands occupied by the "Fort proper," scarcely exceed 200 acres—leaving over 6,000 acres not held "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

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† Clause 17th of sec. 8 of art. 1.

"FORT LEAVENWORTH," AND THE "RESERVATION."

The accompanying map (pp. 9 and 10 of this brief,) will show the situation of Fort Leavenworth proper, and some places on the "Reservation" which seemed to be material at the trial of this case in the court below. The map does not show the northern nor the western boundaries or limits of the "Reserve." It shows only about one-third of the tract so known. It also shows a small section of the city of Leavenworth, separated from the "Reservation" only by Metropolitan Avenue. The officers' quarters, barracks, prison, hospital, etc., and adjacent buildings and grounds, constitute together the "military post" or "fort" proper, are all designated, and all these are *north* of the road designated on the map as "Road to the Cemetery." It is two miles from Metropolitan Avenue north to the officers' quarters, barracks, etc. Lying south of this, and between the fort proper and the city, the map shows roads leading from the city to the "fort"—the locations of the rights-of-way and tracks of the three railroads constructed over and across the Reservation, and the situation of the creeks, one of which (Two-mile creek) is mentioned several times in the record. Two-mile creek is from one-half to three-quarters of a mile north of the north line of the city, and about a mile and a half south of the "fort" proper. The "lower farm" spoken of above is between the Fort proper and Two-mile creek; and the lands south of Two-mile creek, and between that and the city, are unbroken prairie, rough, hilly and precipitous in places, and cut by ravines; (pp. 57, 60, 63.)

This portion of the Reservation, lying between Two-mile creek and the city, extends west from the river more than two miles, and is (as stated above) from one-half to three-quarters of a mile in width, north-and-south. "Metropolitan avenue" has already been described. The road marked "Logan Avenue" on the map is upon the Reservation, (record p. 57,) and runs southwesterly from Fort Road (or macadamized road) to head of Broadway, and thence westerly and northwesterly, leaving about 17 acres of the reserve lying out as "commons" next west of Fort

road, and immediately north of and abutting on Metropolitan Avenue on the north line of the city.

Testimony was given at the trial, and appears in the record, showing points and distances on and within the Reservation with respect to its boundaries, and the location of the Fort proper, and the place where the government claimed the homicide was committed, its distance from the Fort, its proximity to the city, and the like. These points are shown on the map already referred to. Some other features shown by the map may be further explained:

Macadamized road marked "Road to Fort," runs from head of Seventh street north to the fort proper, a fraction over two miles. Viaduct over Two-mile creek, and railroads.

M — Building next north and east of "Parade ground," used for officers' quarters, military school, etc.

H — Embrasures in wall. This wall is about 40 feet wide, and constitutes north end of building occupied as officers' quarters and military school. (These "embrasures" seem to be about the only evidence that preparation has ever been made for "defense" in case of attack.)

R R — Officers' residences.

X — The Grant Monument, southeast of parade ground.

Z — Old arsenal building (and the only building of any kind south of that point.)

O — Triangle — open part of "Reservation" abutting on Metropolitan avenue between Seventh street and Broadway, 900 feet wide on east side, and 750 feet wide on south side — contains over 11 acres of land, and lies out as "commons."

P — Open part of Reservation west of Broadway, abutting on Metropolitan avenue, 1400 feet long by 250 feet wide — contains about six acres, and lies out as "commons."

C — Gate at angle in Logan Avenue, directly north of north end of Broadway — 115 yards, or paces, (or, 345 feet) southwest from D; (record, pp. 49, 184.)

D — Place in Field (or prairie) where it is claimed that blood and false teeth were found, six or seven days after the homicide. This point is 64 feet north of the fence along Logan avenue; (record, p. 189;) and a quarter of a mile west of the macadamized road to the Fort; (record, page 60.)

With these facts before us respecting the *locus in quo*, let us see —

WHAT THE COURTS HAVE DECIDED.

We contend that a criminal offense committed on the Fort Leavenworth Military Reservation, is not cognizable by the federal courts, but is punishable exclusively in the courts of the state — and that this question is conclusively so settled by both federal and state courts.

Kansas was admitted into the Union by act of 29th January 1861. Section one defines the boundaries comprising the state of Kansas, which includes Leavenworth county, and the whole of it, and including of course the "Fort Leavenworth Military Reservation." The boundaries of the state were and are fixed by the constitution, subject of course to the consent of congress. Admitting the state into the Union upon an equal footing with the original states, conferred political jurisdiction upon the state — absolute sovereignty within its territorial limits, except in so far as the original states had yielded or surrendered sovereign power and authority to the federal government for federal purposes. The "territorial limits" of Kansas, as defined in its constitution, were limited or restricted by the act of admission to the extent stated in the following extract from section one of said act:

"Nothing contained in the said constitution respecting the boundaries of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory so long as such right shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with such Indian tribe is not without the consent of such tribe to be included within the territorial limits or jurisdiction of any state or territory; but all *such territory* shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or

otherwise, which it would have been competent to make if this act had never passed."

Now the "Fort Leavenworth Military Reservation" is not included in this exception; and on the admission of Kansas into the Union as *a state*, it became and was within the exclusive jurisdiction of the state courts, as much so as any other of the public lands belonging to the United States lying within its boundaries. "It is true, the United States held the proprietary right, and the right of sovereignty, until the state government was established; but *mere proprietary right*, if it exists, gives no right of sovereignty. The United States may own land within a state, but political jurisdiction does not follow this ownership." Even the lands of the United States within a state are exempted from taxation *by the state*, only "by compact," or express reservation to which the state assents, as expressed in the 6th clause of the 3d section of the act admitting Kansas — "that the said state shall never tax the lands or the property of the United States in said state."

The Fort Leavenworth Military Reservation is not needed nor used for a fort, magazine, arsenal, dock-yard, nor for a custom-house, court-house, post-office, nor for any "needful building," nor even for a national cemetery, nor for any public purpose whatever, and is not within either the letter or spirit of the 17th clause of section 8 of article 1 of the constitution. The court will take judicial notice of the fact, that, while the government owned and retained the title, as it did to all other government lands, upon the admission of the state into the Union in 1861, said "Military Reservation" was not a "fort," nor used as a "military fort" or "post," as, had it been, political jurisdiction over the same could not have been vested in the state at all. There then was and still is a *military fort* known as "Fort Leavenworth," situated within the original boundaries of the "cantonment" or "reserve" established on the Missouri river; and it is a fact also, that said "Military *Fort*" was and is situated or located within that "Military

Reserve," which extends several miles above and below the Fort proper.

In the civil action of *McCracken v. Todd*, 1 Kas. 148, decided in 1862, the supreme court of Kansas held that "the process of all the courts of Kansas could be legally executed anywhere" within the territorial limits of the state as defined in the constitution, whether on Indian or military tracts, "except only on those Indian reservations excluded by express treaty stipulations."

The *United States v. Ward*, (Woolworth 17, McCahon 19,) was decided in the circuit court of the United States for the district of Kansas in 1863. The case was tried before the late Mr. Justice Miller. Ward, a white man, was charged with the felonious killing of another white man on the reservation of the Kansas Tribe of Indians, in what is now the county of Lyon in the state of Kansas. In order to show jurisdiction of the offense in the United States circuit court it was alleged in the indictment, that the offense was committed "on the reservation of land which by treaty with the Kansas Tribe of Indians belongs to them, and was then held by them as their property and place of residence." The court held that the circuit court of the United States had no jurisdiction, and that the courts of the state of Kansas had exclusive jurisdiction of the offense charged; and cited the case of the *United States v. Bailey*, 1 McLean 234, which (though not directly in point) was, said Mr. Justice Miller, "in its reasoning strongly corroborative of the views we have taken."

The case of *Millar v. The State of Kansas*, 2 Kas. 174, was decided in 1863. Millar was indicted for an assault with intent to kill one George Stigers "at the county of Leavenworth." He was convicted and sentenced to the penitentiary. The testimony showed that the offense was committed on a tract of land known as "the Delaware Reserve," and the question was raised, that the offense was not committed within the jurisdiction of the state courts. The limits of the county of Leavenworth, (as were the

limits of all other counties of the state,) were defined by the statute of the state. The lands known as "the Delaware Reserve" were situated partly in Leavenworth county; and the supreme court held that so far as the administration of justice to persons not belonging to the Delaware nation or tribe was concerned, "the Delaware Reserve" formed an integral part of the counties within whose boundaries they were included—following the case of *United States v. Ward*, supra.

The case of *Clay v. The State*, 4 Kas. 49, was decided in 1866. The defendant was charged by information filed in the state district court, with the commission of a larceny "within the county of Leavenworth." He filed a plea to the jurisdiction of the court, setting up "that the offense if committed at all was committed within the *Military Reservation of Fort Leavenworth*, within the exclusive jurisdiction of the United States"; to which plea the prosecuting attorney of Leavenworth county demurred. The demurrer was sustained, and Clay was convicted. He appealed to the state supreme court. The opinion of the court discusses the question of state and federal jurisdiction at some length, and cites several decisions of both state and federal courts; and the court held, that the district court of Leavenworth county had exclusive jurisdiction of the offense.

The *United States v. Stahl*, (Woolworth 192, McCahon 206,) was decided in 1868 in the circuit court of the United States for the district of Kansas, the late Mr. Justice Miller presiding. Stahl was indicted for murder, and the indictment alleged that the offense was committed "in the district of Kansas at a place under the sole and exclusive jurisdiction of the United States of America, to-wit, at Fort Harker, *on land occupied by the United States for a military post, and for other purposes connected therewith.*" To this indictment the defendant pleaded, denying the jurisdiction of the court, and alleged that Fort Harker was established as a military post in the year 1863 under au-

thority of the war department, and that no purchase of the land on which it was established had ever been made by the government of the United States with the consent of the state of Kansas, nor had the consent of the state ever been given in any other mode to the exercise of an exclusive jurisdiction over the land included within said fort by the federal government. To this plea the United States district attorney demurred. *The court overruled the demurrer*, holding that the state courts alone had jurisdiction. It said:

"It needs no argument to show that the right to punish for murder, or for any other offense committed within the limits of her territory, must belong to the state of Kansas, unless some rule of law constitutes special cases exceptions to that right."

Mr. Justice Miller then discusses the claim upon which "the exception" was alleged conferring jurisdiction upon the federal courts, and he quotes and discusses the 17th clause of § 8 of art. 1 of the federal constitution conferring exclusive jurisdiction upon congress over certain territory and places. He then says that, "When the United States admitted Kansas into the Union upon the same footing as the original states, it retained the legal title to all the lands which she then owned in the state of Kansas, *but parted with the sovereignty and jurisdiction for the general purposes of government over it*, with certain reservations or exceptions"; and he then states the two exceptions reserved to the federal government: *first*, as to lands of Indian tribes which had treaties exempting them from state jurisdiction, *and second*, the right to tax the lands of the United States and of the Indians. There were no other exceptions.

We do not overlook the fact, that the counsel for Stahl, in the case last cited, in his plea to the jurisdiction of the federal court, set up among other matters, that "the consent of the state had never been given in any mode to the exercise of an exclusive jurisdiction" by the federal court. This question will be considered further on.

The case of the *United States v. Yellow Sun*, 1 Dillon Ct. Ct. 271, was decided in 1870 in the circuit court of the United States for the district of Nebraska, Circuit Judge Dillon presiding. Yellow Sun was an Indian, and he and three other Indians were indicted and convicted of the murder of McMurty, a white inhabitant of the state of Nebraska. A motion was made in arrest of judgment, on which the question as to the jurisdiction of the court was for the first time presented. This motion was argued, but before any decision was made the defendants withdrew their motion, and thereupon the district attorney moved for judgment upon the verdict, and this motion was not resisted by the defendants. And yet Judge Dillon, in a carefully prepared opinion examined the authorities bearing upon the question of jurisdiction, and held, that the federal courts had no jurisdiction of the crime charged in the indictment, and ordered that the defendants be discharged.

In the case last mentioned the indictment, in order to show jurisdiction in the federal court, alleged that "the defendants are Indians belonging to the Pawnee tribe, which tribe were and are in charge of the United States Indian agent duly appointed by the United States, and were and are living upon the Indian reservation known as the Pawnee Reservation, within the state of Nebraska;" and alleged that said defendants crossed the line of said Indian reservation and entered into the county of Polk in said state of Nebraska, and then and there unlawfully, etc., did kill and murder, etc. Now in that case the defendants were Indians, and as such any offense committed by them *on the Indian reservation* would be within the jurisdiction of the federal courts; but even where the defendants as wards of the government were subject to federal control, yet, when they left their reservation, and went into another part of the state, and committed crimes off their reservation, the federal court had no jurisdiction of any crime so committed. The opinion of Judge Dillon, discussing as it

does at great length the question of jurisdiction of federal courts, is valuable and instructive, although the facts were unlike the facts in the case at bar. Judge Dillon states the true rule respecting the jurisdiction of the federal courts in the following paragraphs—(1 Dil. 277, 278):

"The locality or place where the homicide now in question is alleged to have been committed is confessedly within the territorial limits of the state. It is settled, that there are no common-law offenses cognizable by the courts of the United States; that before these courts can take cognizance of an offense, it must be declared such by an act of congress; and that it is not competent for congress to enact a criminal code, punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States upon the high seas, or within the national domain beyond the limits of any state, or the places over which congress has exclusive jurisdiction. * * *

"There are two statutes relating to murder cognizable by the United States courts—the statute of 1790, and that of 1825. The former act provides, that if any person shall 'within any fort, arsenal, dockyard, magazine, or any other place or district of country under the sole and exclusive jurisdiction of the United States,' commit the crime of willful murder, etc., he shall be punished, etc. * * * It is scarcely necessary to remark that the case at bar falls within none of the provisions of either of these statutes. These statutes do not undertake to punish murder generally, but only when committed at a place within the *exclusive jurisdiction* of the United States."

The two acts referred to by Judge Dillon are the first and second paragraphs of section 5339 of the Revised Statutes of 1878. No subsequent statute has been passed by congress which in any wise confers or purports to confer any jurisdiction upon the federal courts to punish the crime of murder, which can have any possible application to the case at bar.

KANSAS STATUTE OF 1875.

Upon what ground then was jurisdiction claimed and exercised by the circuit court of the United States to try and punish Benson for the crime alleged in the indictment

to have been committed by him? As the writer of this brief understood it then, and understands it now, the court below held that it had jurisdiction by virtue of the *Kansas Statute* known as ch. 66 of the laws of 1875; (Kas. laws 1875, p. 95; Gen. Stat. 1889, p. 1035, par. 3558.) The title of said act is, "An act to *cede jurisdiction* to the United States over the territory of the Fort Leavenworth Military Reservation;" and said act is as follows:

"SEC. 1. That *exclusive jurisdiction* be and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation, in said state, as declared from time to time by the president of the United States, *saving however to the said state the right to serve civil or criminal process within said reservation* in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; *and saving further to said state the right to tax railroad, bridge and other corporations*, their franchises and property, on said reservation."

This act, with its title, is upon its face inconsistent and contradictory. The act declares that "*exclusive jurisdiction* is hereby ceded to the United States," and in the same breath *saves and excepts to the state* "the right" to exercise certain sovereign powers theretofore belonging to the state. But the court below held that this anomalous act of 1875, notwithstanding the fact that the "jurisdiction" ceded or intended to be ceded by that act *has never been recognized by this court, nor by any act of congress*, in virtue of its provisions alone conferred political jurisdiction upon the United States, and that the federal courts had *exclusive criminal jurisdiction* of all offenses committed on that Reservation!

This act of 1875 has been before this court for consideration and construction. The two cases of *Railroad Co. v. Lowe*, and *Rock Island Rld. Co. v. McGlinn*, 114 U. S. 525, and 542, are not only instructive, but upon the ques-

tion of *jurisdiction* they are decisive in the case at bar. The Lowe case was this: Lowe was sheriff of Leavenworth county, and as such he had collected from the railroad company certain taxes levied upon railroad property situated upon the reservation. The railroad company sued Lowe to recover back the taxes. A demurrer to the petition was sustained, and the railroad company appealed to the supreme court of Kansas. That court affirmed the judgment, and in its opinion said:

"It does not appear that this act [act of 1875] was passed at the solicitation or even at the suggestion of any officer or officers of the United States; but even if it had been, still such solicitation or suggestion would have been absolutely and utterly nugatory for all legal purposes, unless it come from some officer or officers exercising the sovereign power and authority of the general government." * * *

"The transference of sovereign jurisdiction from one government to another, is a matter of transcendent importance, and of great public concern. * * * No power to *abandon sovereignty*, or to *abdicate government*, can be found in the constitution of Kansas. Sec. 8 of art. 1 (clause 17th) of the federal constitution does not meet the present case. Nor has *congress consented* to exercise *exclusive legislation* over such Military Reservation." * * *

"We think that the state of Kansas has power and authority to tax railroad property belonging to a private corporation situated exclusively within the boundaries of the Fort Leavenworth Military Reservation. We do not desire to decide specifically just what the civil and political status of the Fort Leavenworth Military Reservation is, or what it may be in the future *if the congress of the United States shall take action upon the aforementioned act of the legislature.*" (27 Kas. 756, 758, 761.)

The McGlinn case was this: In 1874 the Kansas legislature passed an act (known as the "stock law"), making railroad corporations liable for stock killed on railroads not inclosed with a good and lawful fence. This was before the passage of the act of 1875 above mentioned. In 1881, six years after the passage of the act of 1875, a cow belonging to McGlinn strayed upon the road of the defend-

ant at a point within the limits of the Fort Leavenworth Military Reservation where said road was not inclosed with a fence, and was then and there struck and killed by a railroad train passing along defendant's railroad. McGlinn sued the railroad company before a justice of the peace. The case was appealed to the district court of Leavenworth county. McGlinn had judgment for $45, the value of the cow. The railroad company appealed to the supreme court of the state, where the judgment against the railroad company was affirmed. The defense made by the railroad company was, that the cow was killed within the Fort Leavenworth Military Reservation, and that by virtue of the statute of 1875 the courts of Kansas had no jurisdiction of the action brought to recover the value of the cow. The supreme court held that the right of action given by the stock law of 1874 was not taken out of the jurisdiction of the state courts by the act of 1875. (*C. & R. I. Rly. Co. v. McGlinn*, 28 Kas. 274.) Both cases cited were appealed from the state supreme court to this court; 114 U. S. 425, and 542.

Now, while the Lowe and McGlinn cases were civil actions, and the case at bar is a criminal one, we insist that the two cases mentioned are conclusive, that the federal courts have no jurisdiction whatever of or over any transaction or offense committed on the Fort Leavenworth Military Reservation where none of the parties or persons are in the service of the United States, and where the property affected does not belong to the United States. To us it seems absurd, that the federal courts should take or pretend to have acquired any jurisdiction whatever under or by virtue of *a state statute alone*. Their entire jurisdiction is federal, and that is given by the federal constitution, and acts of congress passed in pursuance thereof. What effect congress could have given to the Kansas statute of 1875, or rather, *what jurisdiction congress could have conferred upon federal courts* over the Fort Leavenworth Military Reservation, had it treated the

Kansas statute as giving the consent of the state as in cases of purchase by the government of lands for constitutional purposes, and proceeded to "accept the cession," and to "exercise exclusive legislation" respecting that reservation, is not the question. Congress has never legislated on the subject, nor attempted to ratify the Kansas statute, nor to accept the supposed cession of jurisdiction.

The language of the constitution is, that "congress shall have power to exercise exclusive legislation over all places * * * for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The words "needful buildings" indicate the character of those places which the constitution calls forts. In military law, a "fort" is defined to be, "a fortified place; usually a small fortified place, occupied only by troops, surrounded by a ditch, rampart, and parapet, or with abattis, stockades, or other means of defense; a fortress; a fortification."

The language of the act of congress (§ 5339, R. S. 1878) is: "Every person who commits murder *within* any fort, arsenal, dock-yard, magazine, or other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death." Now it cannot be, that the word "fort," as used either in the constitution or the statute, can be held to embrace a district of country embracing *ten sections of land*. If it did mean that, inasmuch as the constitution went into effect in 1789, and the statute was passed in 1790, then it was a mistake to say, that when Kansas was admitted into the Union in 1861 it took or acquired political and criminal jurisdiction over the "Fort Leavenworth Military Reservation;" and it would follow, that all the decisions made by the state courts of Kansas, and by the circuit courts of the United States, in which it was held that criminal jurisdiction to try and punish for offenses committed on that Reservation (and other like reservations) was within the courts of the state, were wrong; and it would follow also, that, if it were in the power of a state by *its sole act*, which it clearly is not,

to part with any of its territory, or any portion of its political or general sovereignty *as a state*, it was a piece of ridiculous absurdity on the part of the legislature of Kansas in 1875 to attempt to "cede" to the federal government a jurisdiction which the state never possessed.

At the argument in the court below upon the demurrer to the indictment, counsel for the government contended that the Lowe and McGlinn cases in 114 U. S. did not sustain our views. He also cited the case of *Ex parte Hebard*, 4 Dillon Ct. Ct. 382, in which the late Mr. Justice Miller wrote the opinion. When examined in the light of Justice Miller's opinions in the Ward and Stahl cases, *supra*, his opinion in the Hebard case can scarcely be explained. But this last opinion was written after the Kansas act of 1875 had been passed, and evidently his decision was made with reference to the existence of that act. But he did not decide that the Kansas act of 1875 was valid for any purpose. Let us quote from his opinion in the Hebard case, pp. 382 and 353:

"What constitutes the Military Reservation of Fort Leavenworth, is now, and has been the property of the United States ever since the country of which it is a part was purchased from France. * * * The *locus in quo* had a military fort on it, and had been reserved for military purposes for many years before Kansas was admitted into the Union as a state; but when congress passed the law by which the state was created, *it included this reservation within the boundaries of the state*, and made no exception *as regards this piece of land* of the sovereign rights of jurisdiction which it ceded to the state in that transaction. The effect of this, as this court held in *United States v. Stahl* was, that while the title and right of use for all lawful purposes remained in the United States, as it did in all its other land in the state, the political jurisdiction passed to the state of Kansas. If matters had remained in this condition to the present time, there can be no doubt that the warrant under which the prisoner is now held would be void, because the jurisdiction of the offense would be in the state, and not in the federal government. But on the suggestion of the war department of the federal gov-

ernment to the authorities of the state of Kansas, the legislature passed a law, approved February 22d 1875, granting to the United States exclusive jurisdiction over the military reservation, *and if this act is effective for that purpose the writ must be denied.*"

Hebard had been held by an United States court commissioner to await the action of the grand jury upon a charge of larceny. He applied for a writ of *habeas corpus* upon the ground that the jurisdiction was in the state, and not in the United States court. The matter being preliminary, the writ might have been denied without argument, in which case, if indicted, Hebard might plead to the jurisdiction and have the question regularly settled. Evidently, *Justice Miller had doubts and grave doubts as to the validity and effect of the act of 1875*, as seen from his language — "if this act is effective for any purpose," etc. While doubting the validity of the act of 1875, he denied the writ of *habeas corpus*, and left Hebard to raise the question of jurisdiction in such manner that a decision would be final and conclusive. But his opinion in this Hebard case is valuable as showing *what facts are necessary* to enable federal courts to exercise jurisdiction in criminal cases. In discussing the question, whether or not the consent of the state is necessary in all cases for the exercise of jurisdiction by the federal courts, he says, at page 385 —

"The elements necessary to render valid this consent [of the state] to the exercise of federal jurisdiction, are, title in the United States, *and possession for one of the purposes mentioned in the constitution.*"

Outside of the fort proper, as already stated, the Fort Leavenworth Military Reservation lies out partly in fields, and partly uninclosed, and is mainly unbroken prairie land. All south of Two-mile creek, and east of the macadamized road, is gridironed with wagon-roads and railroad tracks, while that portion south of that creek and west of the macadamized road is rough, hilly, precipitous in places, and portions of it adjoining the city are uninclosed "commons." Ownership by the government, (or "title in

the United States,") and that possession which accompanies ownership of land not held adversely, is conceded; but there is not and never was any occupation or possession of that "Military Reservation" for any object or purpose named in the constitution, nor for any special purpose of the general government; (114 U. S. 547.)

Turn to section 5339 United States Revised Statutes. No jurisdiction is specifically conferred or recognized over any "Military Reservation," much less over any "reservation" so called containing over 6,500 acres of land not used for any of the purposes mentioned in the constitution, nor for any other instrumentality, as a federal object or purpose, any more than other unsold government lands lying in Kansas are so used. Nor is said Military Reserve "a place or district of country under the exclusive jurisdiction of the United States." The Kansas statute of 1875 in express terms "saves and reserves to the state the right to tax railroad, bridge and other corporations, their franchises and property on said reservation;" and it was respecting this right that the case of *Railroad v. Lowe* was prosecuted from the state district court to the supreme court of the United States. That act does not in terms nor by necessary implication reserve to any citizen of the state of Kansas the right to prosecute civil actions against any railroad corporation for injuries sustained by the killing of stock by the moving cars of a railroad within the "Fort Leavenworth Military Reservation;" and yet the supreme court of the state, and this court also, held that the right to prosecute and maintain such an action in the *state courts* existed, notwithstanding the act of 1875. If *exclusive political jurisdiction* belonged to the United States, no such action could be prosecuted in the state courts. As the state still had and retained political jurisdiction, notwithstanding the act of 1875, the action of McGlinn for killing his stock, was rightly prosecuted in the state court. The statute of 1875 does not (nor does any other statute) make any distinction between inclosed and

uninclosed portions of the Fort Leavenworth Military Reservation as respects what is attempted to be ceded to the United States; nor does the act of 1875 nor any other statute "reserve to the state" the right to enforce its laws for the protection of the stock; but the jurisdiction of the state and the state courts in that regard is asserted by Mr. Justice Field in 114 U. S., page 547, thus:

"The government of the state of Kansas extended over that Reservation, *and its legislation was operative therein except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation.* In other respects the law of the state prevails."

Now the act of 1875 neither expresses nor implies any use of that Reserve, present or prospective, "as an instrumentality of the general government;" nor does it appear anywhere that the general government has at any time either before the passage of that act or since made any use of that Reserve "for any federal purpose," or as an "instrumentality" for any federal purpose. It nowhere appears that this Reserve has been more needful to the general government since 1875 than it was at the time of the admission of Kansas into the Union in 1861. "May have excepted," are the words used by Mr. Justice Field. The government has made no use of the land which *has excepted* it from the operation of the state laws. If the state statute relating to the killing of stock by railroads "is still operative therein," and is not inconsistent with "the use of the land as an instrumentality of the general government," *why is not the state law for the punishment of crimes also operative therein?* How do such laws and their enforcement by the state courts for offenses committed on that Reserve by one private citizen against another private citizen interfere with any federal right, or obstruct any federal purpose? Does the arrest, trying, and hanging of a private person, who was never in the employ or service of the general government, and who never interfered with any property, officer, soldier, or servant of the United States, bring

the "Fort Leavenworth Military Reservation" *into use as an instrumentality of the general government?*

In the Hebard case Mr. Justice Miller says, that it was "on the suggestion of the war department of the federal government," that the Kansas legislature passed the act of 1875. In the Lowe case, 27 Kas. 756, Mr. Justice Valentine says: "It does not appear that this act of the legislature [of 1875] was passed at the solicitation or even at the suggestion of any officer or officers of the United States." It matters nothing who was right or who was wrong in this respect. The secretary of war, or the "war department," is not the congress, nor in any sense a law-making officer or department. As Justice Valentine said in the Lowe case, (27 Kas. 756,) any "solicitation or suggestion would have been absolutely nugatory for all legal purposes unless it came from some officer or officers exercising the sovereign power and authority of the general government." The congress might have excepted out of the boundaries or territorial area of the state this "Military Reservation," or any other of the public lands. But it did not do so. It needed no "exception" of the "Fort," known as "Fort Leavenworth," because the federal constitution itself recognizes "forts," as a necessary instrumentality of the general government; but it does not recognize a five-thousand-acre "farm," or four or five sections of rough uncultivated land. "Forts," "arsenals," etc., "and other needful *buildings*," implies, according to the maxim, *Noscitur a sociis*, that all lands held by the government as "instrumentalities" for some necessary federal purpose must be occupied with necessary and proper buildings, as a fort, an arsenal, a dock-yard, a magazine, a custom-house, a court-house, and the like, or as a "city of the dead," as a national cemetery.

Can there be any question that, *except as to land actually occupied by the government for some or all of the purposes mentioned in the constitution*, and excepting also the lands expressly exempted from the jurisdiction of the state, that

upon the admission of Kansas into the Union the political jurisdiction passed to the state absolutely over all the lands lying within the boundaries of the state? We think not; and we think the argument and reasons stated in the opinion of the supreme court of Kansas in the McGlinn case, in 28 Kas. at page 277, are unanswerable; and we think also, that Mr. Justice Field's opinions in 114 U. S. pp. 526, 538, 541, and 543 to 547, are overwhelmingly conclusive against the jurisdiction claimed by the circuit court over the "Fort Leavenworth Military Reservation." Mr. Justice Field makes it plain beyond question, that the state did not and could not surrender its political jurisdiction over any part or portion of that tract of land called the "Reserve," except so much (if any) *as congress should accept and use for some specific and constitutional and needful purpose.* (See especially his words on pp. 546 and 547, in the McGlinn case.) Hundreds and thousands of acres, whether inclosed or uninclosed, unused and unoccupied for any needful purpose of the general government, cannot be within the political jurisdiction of the United States.

To hold that the federal courts have "exclusive criminal jurisdiction" to try and punish *for all offenses* committed upon or within the "Fort Leavenworth Military Reservation," is to give or furnish *absolute immunity* to hundreds of offenders for offenses likely to be committed yearly within two or three hundred feet of the northern boundary of the city of Leavenworth, and within sight of the good people of that city who may chance to be upon the public street known as Metropolitan Avenue, or who may happen to look from the northerly windows of their dwellings. Take a few cases where white persons, not in any wise in the employ or service of the United States, are the actors or offenders, and where no property of the government is injured or molested:

Jones and Keith, while out on a stroll step off Metropolitan Avenue on the north side, whether on the open

space marked on the map as O, or P, or climb a fence into the inclosure, and get into an angry discussion, and Jones commits an assault and battery on Keith. No city court, no state court, has jurisdiction to punish Jones, if the case at bar was rightly decided by the circuit court; and no federal statute provides for punishing any such offense.

So too, the offenses of adultery, fornication, and indecent exposure of person, whether committed by night or by day, if committed on the "Reservation," are not (if the Benson case was rightly decided) within the jurisdiction of any city or state court — and no federal statute, except the "Edmunds Bill," passed in 1882 in reference to bigamy and polygamy in territories, and the "Edmunds-Tucker Bill," amending the act of 1882, and which took effect in March 1887, provides for punishing such offenses; and these acts were not designed to have any application anywhere except in Utah, and other polygamous territories.

Take this case: Smith is an important witness in an action pending and triable in the state courts at Leavenworth. Parsons, a party to the suit, takes Smith out for a drive to the "Fort." When north of Metropolitan Avenue, and in the public road, he bargains with Smith to give false testimony in the action, and openly and publicly pays him the bribe-money agreed upon. Parsons cannot be prosecuted and convicted of bribery in any court of the state of Kansas, if the Benson case was correctly decided; and the offense committed by him is not in the reach of any federal statute.

Another case: A Kansas statute makes it a felony of a high grade "to carnally and unlawfully know any female under the age of *eighteen* years." The act of congress makes it a felony "to carnally and unlawfully know any female under the age of *sixteen* years" in the District of Columbia, "or other place (except territories) over which the United States has exclusive jurisdiction." If the Benson case was correctly decided, any man may take or lead

a girl or woman who is between sixteen years and eighteen years of age, to any point on the "Fort Leavenworth Military Reservation" ten feet north of Metropolitan Avenue, and there "carnally know her" with her consent, and be guilty of no offense for which he can be tried or punished in any court of the state or of the United States; while, if the act were committed 120 feet further south, the man committing it could be tried in the district court of Leavenworth county for rape, and punished by imprisonment in the penitentiary for a period not less than five nor exceeding twenty-one years.

If this court will look at the catalogue of crimes and misdemeanors known to the laws of the United States, and to the catalogue of crimes and misdemeanors known to the laws of the state of Kansas, it will find scores of offenses which affect the public peace, public safety, public morals, individual rights of person and reputation, which, *if the Benson case was rightly decided*, can be committed daily and hourly within ear-shot of the good people of Leavenworth, and which are not cognizable by any court under any law of the United States, and which are not within the jurisdiction of any Kansas state court, being committed on the "Fort Leavenworth Military Reservation;" and this, although such offenses shall be committed *more than two miles* from any "Fort, Arsenal, Dock-yard, Magazine, Custom-House, Post-Office, or other needful building of the United States" erected and "used for a federal purpose."

It may be a pecuniary benefit to the people of Leavenworth county to have the federal courts held in their county take jurisdiction of "offenses committed on the Reservation," though not committed against the government, nor against the property of the United States, nor against the person of any officer, soldier, or agent of the United States, civil or military, and try such cases at the expense of the government; but just how the government of the United States is thereby benefited, and the dignity and sovereignty of the state of Kansas is thereby maintained, is

not apparent. Nor does it seem to us, that the arresting, the trying, the convicting and punishing such offenders subserves any "federal purpose" whatever, nor that such proceedings are in anywise necessary to protect or preserve the government of the United States for any of the purposes for which the government was formed.

Nor is there concurrent jurisdiction of offenses committed on that "Reservation." Crimes committed within any "fort" are within the exclusive jurisdiction of the federal courts. Crimes committed by private persons outside of or away from a "fort" proper, and not committed against any property of the government, are within the exclusive jurisdiction of the state courts. If this is not so, then a mere state statute can divest or destroy state sovereignty, and confer upon federal courts a jurisdiction not theretofore possessed by the federal government. A state cannot by its sole act narrow or reduce its territorial area, nor divest itself of any part of its political jurisdiction; (U. S. Constitution, 1st clause of § 3, art. 4; clause 17, § 8, art. 1.)

If Kansas by the act of 1875 could divest itself of all jurisdiction over 6,500 acres or more of land in Leavenenworth county, not used for any purpose named in the constitution, nor for any other needful building for a federal purpose, then by its sole act it can set off to the state of Missouri the entire county of Leavenworth, or cede the entire jurisdiction of the state to Colorado over all the government lands lying on the borders of that state. (Cooley's Const. Limitations, 280, 283.)

COMPETENCY OF MRS. BENSON AS A WITNESS.

The 4th and 5th assignments of error (record, p. 236,) relate to the question whether the wife of plaintiff-in-error was a competent witness to testify at the trial against him. The record shows (at pages 11 and 12) that the district attorney called Mrs. Johanna Benson as a witness, whereupon defendant's counsel objected to her being used as a

witness for the government. The purpose for which Mrs. Benson was called as a witness was not then apparent. As stated in the record, it was conceded, that, *under the laws of Kansas*, she might if she chose testify as a witness for the state against her husband *as to facts within her personal knowledge*, other than "communications" made to her by her husband during the marriage relation. And so she was instructed by the court, that she could testify or not as she pleased; and through an interpreter she answered, that "what she knows and can answer she will testify to." She was then shown certain papers, which she identified, and she testified that such papers *were letters received by her from her husband, and that they were in his handwriting.* At page 46 Benson's counsel moved *to strike out the testimony of Mrs. Benson, on the ground that it was incompetent.* This motion was overruled, and an exception was taken.

The testimony given by Mrs. Benson relates solely to letters or "communications" which she said she had received from her husband, and that such communications were all in his handwriting. Was she a competent witness for the purpose for which she was used? We say not. The competency of husband or wife as a witness against the other in criminal trials in the federal courts, except by the act passed as late as 3d March 1887, known as the "Edmunds-Tucker bill," has never been directly authorized or recognized by act of congress. The competency of witnesses in the federal courts therefore has been, and as a general rule is, determined by the rules of the common law, or by the statutes of the state in which the federal court is sitting at the time of the trial. Chap. 397, approved 3d March 1887, (the Edmunds-Tucker bill) relates to the offenses of "bigamy, polygamy, and unlawful cohabitation," and it provides, that in any proceeding or examination before a grand jury, a judge, a justice, or a United States commissioner, or a court, in any proceeding *for either of said offenses*, under any statute of the United States, "the lawful husband or wife of the person accused

shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination or prosecution without the consent of the husband or wife, as the case may be; and such witness *shall not be permitted to testify as to any statements or communication made by either husband or wife to each other*, during the existence of the marriage relation, deemed confidential at common law." Now this is the first act of congress we have been able to find wherein congress has attempted to make either husband or wife a competent witness against each other in any criminal prosecution; and this act itself limits their competency as such witnesses to examinations or prosecutions for the particular offenses of "bigamy, polygamy, or unlawful cohabitation." This act of congress therefore does not and cannot apply to any cases or trials for murder, or for any other offense triable in the federal courts, whether a felony or a misdemeanor. But it is most significant, as indicating alike the policy and the wisdom of congress, and as recognizing the well-settled rule of public policy, that even in this "Edmunds-Tucker bill," or "polygamy bill" of 1887, husband and wife were *prohibited from testifying against each other as to any statement or communication* made by either to the other, during the marriage relation, deemed confidential at common law." If Mrs. Benson was competent to testify as a witness against her husband "respecting" or "as to any communication" made by him to her, the authority therefor is not to be found in any act of congress. And we insist, that, under the *laws of the United States* she was not a competent witness for any purpose whatever *against her husband*, even though she might be willing to testify.

The legislature of Kansas in 1871 amended § 215 of the criminal code, to read as follows:

"SEC. 215. No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution; or

by reason of his being the person on trial or examination; *or by reason of being the husband or wife of the accused;* but any such facts may be shown for the purpose of affecting his or her credibility: provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination." (Laws of 1871, p. 280; Gen. Stat. 1889, par. 5280.)

No act of congress makes this Kansas statute, nor any similar statute, applicable in criminal causes generally in the federal courts. After the passage of the act of 1871 the supreme court of the state, in *The State v. McCord*, 8 Kas. 232, held that the wife of the person on trial in a criminal case was competent to testify as a witness for the state, if she chose to do so voluntarily.

This statute of 1871 does not declare that the wife shall not be a competent witness to testify "concerning communications" made to her by her husband during the marriage; but from territorial days down to the present time the statute of Kansas relating to the competency of witnesses has declared that —

"In no case shall either (husband or wife) be permitted to testify *concerning any communication* made by one to the other during the marriage, whether called while that relation subsisted, or afterwards." (Civil code, § 323.)

It will be observed that the word "confidential" is not in this statute at all — differing in that respect from the act of congress already cited, and from most state statutes. But the words are negative and prohibitory — "in no case," etc. True, the clause quoted is found in section 323 of the present civil code of Kansas; but the criminal code has at all times provided, (crim. code, § 209,) that the "provisions of law in civil cases relative to the testimony of witnesses, their examination," etc., "shall extend to criminal cases, so far as they are in their nature applicable thereto." But if the suggestion shall be made that the act of 1871 prescribes a rule of competency generally, and that that act was passed subsequent to the provisions of the civil code to which we refer, the answer is, that section 323 of the

civil code was amended *after* the act of 1871 was passed, and as it now stands was passed and took effect on 21st March 1872; (Laws of 1872, p. 334.) It is plain therefore, that the prohibition, that "*in no case*" shall the wife be permitted to testify "*concerning any communication*" made to her by her husband during their marriage, was in force at the time of the trial of the case at bar in the court below — and that it was error to permit Mrs. Benson to testify respecting or concerning the letters or communications made to her by her husband, and received by her from him.

In the case of *The State v. McCord*, supra, Mrs. McCord voluntarily offered herself and testified as a witness for the state against her husband, but *not* respecting "any communication" whatever made to her by him, but concerning the fact or act of the shooting or killing by her husband of her paramour; and the case is not instructive here.

The case of *The State v. Buffington*, 20 Kas. 599, may be cited by the government as holding contrary to the opinion which we entertain in the case at bar. In that case, a letter written by the husband to his wife was offered in evidence upon the trial of the husband; but it was not produced by the wife, nor was she called upon at the trial nor at any time to testify at all "concerning" that letter or communication, or concerning anything else. The letter was produced at the trial by a third party. Its genuineness was not only proven, but was not disputed. The contention was, that the *communication itself was a privileged one.* The court held otherwise. The question therefore as to the competency of Mrs. Buffington as a witness against her husband, was neither raised nor suggested upon the trial of the case, nor in the opinion of the supreme court. What the supreme court decided was, that "where a letter previously written and signed by the defendant, to his wife, is not in the custody or control of either the defendant or his wife, but is in the custody and

control of a third person, such letter may be used as evidence by the prosecution." Now this decision clearly recognizes the statutory rule, that neither husband nor wife will be "*permitted* to testify concerning any communication made by either to the other," and also the rule of public policy, that neither will be *compelled* to produce any letter or communication from the one to the other to be used as evidence against either.

A few other cases involving this question may be instructive: The case of *Bowman v. Patrick*, 32 Fed. Rep. 368, was tried at St. Louis in September 1887 before the late Mr. Justice Miller. It was a civil action, in which the question of the admissibility and competency of letters written by a defendant to his wife were involved. In his opinion, Mr. Justice Miller goes to the fullest extent in holding that such communications were inadmissible and incompetent. The letters were filed as exhibits in a master's report of testimony taken in the case, and a motion was made to strike them out. This motion to suppress was made upon the ground, that "the letters were such communications as are protected by the principle which the law throws around communications between husband and wife." We quote from Mr. Justice Miller's opinion:

"I confess I was very much astonished to find that there are some authorities which hold, that while the wife cannot be permitted to tell, and not only that *but will be forbidden to tell*, what her husband says to her in any matter of a marital or private relation, or while the marital relation existed she will be forbidden to tell anything, and will not be permitted to tell anything on the stand to the injury of her husband; I say, I am surprised to find that there are some authorities holding that where this evidence can be got at, either by obtaining possession of the letter, or by some method of overhearing communications by some third party between husband and wife, that this evidence can be used. We have examined these authorities, and as exceptions, they do not include the present case."

If an appeal was taken in the Bowman-Patrick case, it is still pending and undetermined in this court. But we

confidently assume, that the law of the case as decided by Mr. Justice Miller is too firmly settled to be overturned by this court. The case at bar comes within no exception to the general rule recognized by courts — and the ruling of the circuit court was not only contrary to sound public policy, but in direct conflict with the statute of Kansas.

The case of *United States v. Jones*, 32 Fed. Rep. 569, was a criminal case, and it was expressly decided, that "in the courts of the United States the wife is not a competent witness for or against her husband in a criminal case, and this on the score of public policy." And in a note to the opinion in that case, numerous cases are cited showing how far different states have changed the rule of the common law respecting the competency of husband and wife as witnesses against each other, the grounds upon which such changes are sustained or upheld, and the reasons which not only permit, but sometimes compel, them to testify against each other respecting offenses committed by the one against the person of the other. But an examination of the cases referred to will furnish no ground for holding in the case at bar that Mrs. Benson was a competent witness to testify against her husband "respecting any communications made by him to her."

The case of *Selden v. The State*, decided in the supreme court of Wisconsin in April 1889, 42 N. W. Rep. 218, (74 Wis. 272,) is instructive. Selden was indicted for perjury alleged to have been committed by him in an action for divorce between himself and Emma Selden his wife. Upon the trial, one Knowles, who had been the attorney for Mrs. Selden in the action for divorce, was required by a *subpena duces tecum* to produce certain letters which had been written by Selden to his wife, which letters plainly showed, that both in the affidavit made for constructive service in the divorce action, and in the testimony given by him on the trial of such action, he had sworn falsely. Selden's counsel objected to the introduction of the letters upon the ground, first, that they were

"incompetent as being confidential communications between husband and wife," and, second, that "the production of the letters by Mrs. Selden's attorney was an unlawful betraying of a privileged communication between himself and his client." The supreme court held that both of these positions were well taken, and that the circuit court erred in allowing Knowles to produce the letters, and in allowing the letters to be used in evidence against Selden. In a note to the opinion the attorney is shown not to have been in fault in producing the letters, because he produced them under the compulsory process of the law. But the letters themselves were regarded as "confidential communications between husband and wife" which could not be given in evidence against the husband over his objection; and the court stated that the evidence was made incompetent by the Wisconsin statute, quoting the statute as follows:

"The husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other."

This Wisconsin statute is negative and prohibitory. "The wife *shall not* be allowed to disclose a confidential communication made to her by her husband during the marriage, without his consent." The Kansas statute is alike negative and prohibitory. "*In no case* shall the wife be permitted to testify concerning any communication made by her husband to her during the marriage." The spirit and purpose of these two statutes is the same. In the Wisconsin statute the wife is not permitted to disclose a *confidential* communication. In the Kansas statute she is not permitted to "testify concerning *any communication;*" and it is very evident, that when Mrs. Benson was permitted to testify that certain letters or communications which had been written or made to her by her husband were "in her husband's handwriting," she testified *concerning* such communications; and the materiality of that testimony will not be questioned, as, without it the letters or communica-

tions were not proven or established at all, and could not have been given in evidence at the trial.

It may be said that it was not *Mrs. Benson's testimony*, but *the letters written by Benson himself*, which furnished evidence against him. The court will look in vain through the record to find a single word of testimony given by any witness other than Mrs. Benson respecting the penmanship, or handwriting, or the genuineness of the letters; and without her testimony, that the letters were in his handwriting, and "communications" written by him to her, they could not and would not have been given in evidence against him.

* * *

On the argument of the motion for a new trial the district attorney contended that *as Benson* had testified in his own behalf, and had admitted that the two letters in the record marked "A" and "B" were written by him, the error, if it was error, to call *Mrs. Benson* as a witness for the government *was cured*. The same claim will no doubt be made here. As before stated, the only witness by whom the government was enabled to prove that the letters or communications were in the handwriting of Benson, was his wife. Benson's daughter was on the stand as a witness for the government, and acted as interpreter for her mother during her mother's examination as a witness. She testified that she did not know her father's handwriting, the letters being written in German, and she not being able to read that language. *Upon Mrs. Benson's testimony alone*, as to identification and handwriting, the government, over Benson's objection, put those letters in evidence. Counsel had duly objected to Mrs. Benson, contending that she was not a competent witness, and had moved to strike out her testimony for the same reason. When the letters were offered, they were objected to (page 121) on the ground that they were "communications and statements made by a husband to his wife, and not competent testimony to be used against him."

In order to get the papers before the jury they had to

be translated into English, and Max Groenfeldt was made a witness by the government for that purpose; (printed record, pp. 120 to 125.) That Mr. Groenfeldt's translation was difficult and uncertain, is shown by his repeated remarks appearing in the record. We quote from page 122, where he is trying to read one of the letters:

"I cannot make it." * * * "There is a line and a half hardly legible, entirely blotted out." * * * "I give it to you as it is written — poor German." * * * "Judge, it is impossible to read one line; it is entirely blotted out." —"*The Court:* Very well, if you cannot read it, proceed then."

After another of the papers had been translated and read by Mr. Groenfeldt, the following occurs at page 123:

MR. WEBB: Mr. Benson tells me that while this witness is reading that he do n't interpret these correctly. I propose that Benson take the stand and read those letters in English, and this witness (Groenfeldt) look over his shoulder.

THE COURT: Mr. Benson can go on the stand *if you offer him as a witness.*

MR. WEBB: I know he can, but he tells me that the witness has not [correctly] interpreted quite a good many of those words.

THE COURT: The witness is subject to cross-examination, and Mr. Benson has the right to testify.

MR. GROENFELDT, (page 124:) "It is badly blotted, poor German, and it is hard to interpret it." * * * "There is one passage I cannot make out."

"THE COURT: Pass it."

MR. GROENFELDT, (page 125:) "It is blotted out."

Mr. Benson's counsel thought they understood the rights of their client as to his being or not being a competent witness. They had objected when the government counsel offered testimony which was itself *incompetent*, and had excepted when that testimony was admitted; but they desired that that testimony, incompetent though it was, if admitted, should not be garbled or misconstrued, and so they proposed that the witness who admitted his inability to fully and correctly translate it should be assisted by

Benson himself in reading the "letters," without subjecting Benson to the alternative of admitting by his silence the false interpretation, or of being forced upon the witness-stand to admit the writing, and then explain. But the court of its own motion prevented the former course, twice suggesting that Benson himself "had the right to testify." Under these circumstances there was nothing left for Benson to do except to go upon the stand and correct the erroneous interpretation and construction which had been given to the letters. He was called to testify in his own behalf, (printed record, p. 193.) At page 204 his attention was directed to the "letters" and "slips." We quote from pp. 204, 205, and 206. He was examined by his counsel, Mr. Webb:

Q.–I will ask you whether you sat here this morning and heard Mr. Groenfeldt read some letters and some slips? A.–Yes sir.

Q.–And you looked over the slips at that time? A.–Yes sir.

Q.–I will ask you if you wrote those papers? A.–*I could hardly tell that; I hardly read them all;* may be I wrote them.

Q.–Did you write the *two letters* to Mrs. Benson? A.–Yes sir; I wrote some to Mrs. Benson. [Benson is then shown the letters A and B, and says they are in his handwriting.]

Q.–I wish you would take that letter, [Exhibit A.] I wish you would look at it where it says something about a muffler. Do you find anything about a muffler? A.–Yes sir.

Q.–There is one statement in this letter which I assume is rightly interpreted: "The Rautzahn is a false snake which knows everything; she will put it on Benson." * * I want you to read the next sentence and put it in English. That says, in English, what? A.–It is here, that "she states that there was a muffler found, and she said it was mine. That is a big lie; that was not my muffler; I never wore a muffler in my life."

Q.–What is the next sentence? A.–"She gave me a muffler for a present, and I never wore them because I did n't wear a muffler."

Q.–I want it read; I wish you to translate it. You point that out.

Let it be observed here, that so intent was the prosecution to make use of Mr. Groenfeldt's "translation," that before Benson's counsel had fairly commenced sifting the matter to secure a correct reading or construction of the letter, the government witness, Mr. Groenfeldt, the counsel (Mr. Atwood) who was assisting the District Attorney, and the District Attorney also, interfered with the examination and the witness. We quote from the record, page 205, next following the last question asked by Benson's counsel as above:

"WITNESS MAX GROENFELDT *here examines the letter and said, Now let me read as he explains his writing.*"

And then for nearly a page the record shows that Mr. Groenfeldt, Mr. Atwood and Benson's counsel were at a disagreement in regard to what Benson had in fact written —that Benson's counsel was insisting that Groenfeldt's translation should be corrected; that Mr. Groenfeldt had begun to doubt his accuracy, and proposed to "take another gentleman and compare" his translation with the original—saying that, "it is an important matter," and he didn't "want the responsibility." And then follows this —printed record, page 206:

"THE COURT: How about the additional words?

"MR. GROENFELDT: I believe I said *I could not read these.* 'This one is new.'

"MR. WEBB: I wish, if your honor please, that that correction be made.

"MR. ADY: If the *defendant swears* it is as he contends it is, *I will let it stand; I would not change Mr. Groenfeldt's translation.*"

Thus shows the record! Mr. Groenfeldt, the government witness, had made translations of the papers which had been given and read in evidence, (printed record, pp. 120 to 125,) which were clearly wrong in some respects, and incomplete and uncertain in other respects. Benson's counsel wanted corrections made, and the District Attorney

declared *that he would not change Mr. Groenfeldt's translation, even if Benson should swear that the original writing had a different meaning or import!* Who knew best what that writing was, the man who had written it, or the witness who had admitted it to be "poor German," "ungrammatical," whole lines erased, illegible in places, and almost impossible to be read? The question suggests its own answer — but the government attorney "would not change" the inaccurate translation, even though the error was proven by the oath of a competent witness! Is the life of any citizen to be thus taken away?

One further effort was made to obtain the meaning of some portions of one of the letters — printed record, p. 206:

"MR. WEBB: I want to call your attention, Mr. Benson, to the statement in that letter — 'She can live in incest with her old man.' I will ask you why you wrote that, and whether Mrs. Rautzahn told you about her living in incest with her father?

"MR. ADY: We object; it is incompetent.

"THE COURT: Objection sustained.

"MR. WEBB: Then that is all."

The question asked Benson was not "incompetent" — but it was manifest that efforts to secure a correction of the mistakes made by Groenfeldt, would be useless. Upon what theory can it be said that the ruling of the circuit court was correct? Benson alone was on trial. He alone could be affected by the question and its proper answer. And is it not a settled rule of evidence, that any party to a suit may explain why he said or did a particular thing which *if unexplained* would tend to criminate or inculpate him? One is legally held to intend the natural and probable consequences of his acts; but may he not always purge himself of a criminal or malicious intent, by showing an actual and honest mistake, whether in word or act? A supposed felonious homicide may be shown to be excusable, or justifiable. An alleged burglary may be shown to be a breaking and entry under mistaken authority, or mistaken ownership. And so on, through the whole cata-

logue. Benson's ignorance of the meaning of particular words and terms, his misuse or misapplication of phrases, whether written in "poor German" or poor English, and why, or upon what grounds he made a particular statement, were matters of great significance in properly weighing what he said. The letters had been placed before the jury, tortured and perverted, and were being used against him. Although the letters assert again and again, that he is wholly "innocent of the murder," yet the government sought to prove by certain passages in the letters, as construed by its witness and counsel, that he was guilty. We say he had an undoubted right to explain why he wrote any sentence, and what he intended by the words used by him, and it was error to refuse to permit him to do so. (12th assignment of error, record, page 237.) Can it be possible that in a case of life or death, the government attorney will be permitted to violate positive law respecting the competency of witnesses and testimony, and plain rules of evidence in order to get testimony before the jury which is not only incompetent, *but which is perverted*, in order to secure a verdict of guilty, and then, that the court must say to the accused, "If you open your mouth as to these statements of yours, no matter how much we have perverted them, you will be held to have waived all objection to our proceedings"? To do this, is to give the sanction of the law to any practice, no matter how cruel or illegal, which zealous officers may resort to to secure convictions. To do this, is to disregard or to override every rule of law prescribed for the protection of the rights of the citizen. We do not believe this court will sanction any such rule. In this case, *witnesses who were incompetent* were permitted to testify. *Testimony which was incompetent*, was permitted to go to the jury; and even that testimony was perverted and misconstrued. To sanction such proceeding, is to revive in all their infamy and horror the rack and the thumbscrew of the Spanish Inquisition of the twelfth and thirteenth centuries, and which, according to Macaulay, was transferred to England and "introduced

into the Tower occasionally under the plea of political necessity." The rack was quite as justifiable as a "political necessity" as is the claim of federal "political jurisdiction" over the *locus in quo* in the case at bar — quite as justifiable as the means resorted to to obtain illegal and incompetent testimony to demonstrate that it is a "federal purpose" to hang a private citizen for a supposed offense committed against another private citizen, and that the *locus in quo* is "a necessary instrumentality of the general government" to the accomplishment of that purpose.

* * *

We insist the letters did not and do not, when rightly read and construed, prove or even tend to prove that Benson *committed the homicide.* The most that can fairly be claimed by the government is, that the letters tend to prove that Benson was an accessory after the fact — the maximum punishment for which is, imprisonment for three years, and a fine of five hundred dollars; (U. S. Rev. Stat. § 5533.) Read the letters and see:

Exhibit "A" — (printed record, p. 121) — "I see from the papers that my name is connected in them awful lies; I can't bear it." "I am quite innocent of the whole affair. The cursed lying woman who accuses me of this wants to lay this on my shoulders. She is a false snake."

Exhibit "B" — (printed record, p. 122) — "I have deceived you horribly, my good wife. I had a secret love affair for over three years with Mrs. Rautzahn." "You will find," etc., (naming the place in Kansas City, and a lot of articles;) "all these things she procured in order to come next month with the children; but since the murder happened of the mother, she wants to clear herself of the whole business, and lays the blame on C. A. Benson, *who is entirely innocent of the murder.*" "The authorities are looking for the murderer. They do n't know that Mrs. Rautzahn knows everything, and that she is the cause of everything." "The Rautzahn is a false snake." "*I am innocent of the whole murder*, but not innocent in regard to my love affair. Mrs. Rautzahn is now Mrs. Waldo. One must ask *for* (of) Mrs. Waldo, to whom she gave the $400, for she knows the whole secret of the whole business."

Exhibit 1—(printed record, p. 123)—"For over six months my name is Richard Waldo, and Mrs. Rautzahn is Mrs. Waldo." "Mrs. Waldo has always presented herself as my wife. She is the only cause of the whole business. The mother did n't have the $400 with her. Mrs. Rautzahn should confess to whom she gave the money; then the world will know everything. The truth is, *the mother was in her way for a long time*—and also you, Mrs. Benson, because she could enjoy better her hours of love. She is a miserable snake." "*Now she can better live in incest with her old man, now she is always alone with him.* No, my dear sweet girl, you have believed you could put everything on Benson, but Benson will show it to you, you miserable snake. *How can you dare to bring Benson into misfortune since he is innocent of the murder*, but not of the love affair?"

Exhibits 2, 3, and 4, contain nothing important.

Exhibit 5—(printed record, p. 124)—"The fault only was with Mary. She has lost [me] honor, wife, and child; and now since she is alone with her father she wants to lay the whole blame on me." "Mary knows well to who she gave the money. She knows the whole secret." "*I have nothing to do with the murder*, but with Mary Rautzahn I had to do over three years."

Exhibit 6—(printed record, p. 124)—"Mrs. Rautzahn knows the secret about the $400, and about her mother." "She will confess; she only plays double."

A motion for a new trial was duly filed, the 6th clause of which is that the verdict is contrary to law and is not sustained by sufficient evidence; (record, pp. 233, 234.) Through an oversight this clause was omitted from the 14th assignment of error, (page 37.) It may not be improper, nevertheless, to refer to the character of the testimony, as clearly showing upon the face of the record that the conviction of the offense charged in the indictment is contrary to law. The indictment contains no count charging Benson as an "accessory." Both defendants were charged as principals in the first degree. Strike from the record the testimony of *Mrs. Benson* and *the letters*, and there was no testimony against Benson which was sufficient to convict him of even assault and battery except the testimony of

Mrs. Rautzahn, his co-defendant. And Mrs. Rautzahn's own testimony shows conclusively that she was vilest among the very vile, whether guilty of incest with her father or not; (printed record, pp. 138, 139, 140 and 142.) She testified in substance, that Benson had planned the killing of her mother, and then the killing of her brother, whereupon her brother's money and property would belong to her father, and then the killing of her father, whereupon all the property and his life-insurance would go to her as sole heir of her father; that she made no objections to the committing of these crimes, but took her "solemn oath" that she would not speak of it, and did not inform either her father, mother or brother, nor take any pains to inform the police, or notify them, although she was at home with her parents in Leavenworth a good share of the time afterward, while Benson was in Kansas City; (pp. 128, 129, 130, 143, 144.) She testified that on the Monday morning after her mother's disappearance she stole the money herself—taking it from the bed where it had been kept, and put it in the bureau drawer and locked it; that that same night she took the money and gave it to Benson, (pp. 133, 149.) She admitted (while testifying against Benson) that at the coroner's inquest she had testified that "the money was taken from the house, and disappeared with her mother," (page 154,) thus showing that she had deliberately committed the crimes of larceny and perjury. It is impossible to read her testimony, appearing in the printed record at pages 125 to 157, and not be convinced beyond a doubt, that *Mrs. Rautzahn herself*, alone or with others, planned and executed the terrible crime for which she stood jointly indicted with Benson, and that her degradation, depravity, falsity, and general wickedness were such that she was not entitled to any credit at all as a witness for the government against Benson. Strike *her testimony* from the record, and there is nothing left upon which Benson could have been convicted of any offense whatever—and it was certainly error to overrule the motion for a new trial.

In connection with Benson's continuous declarations of innocence respecting the crime charged, a most singular feature of his letters, is, that he says—

"The authorities are looking for the murderer; they don't know that *Mrs. Rautzahn knows everything*, and that *she* is the cause of everything," (printed record, p. 122;) she is the cause of the whole business; the mother did n't have the $400 with her." * * * "*One should hear Mrs. Rautzahn, then you will know everything*, (page 123.) "Mary know well to who she gave the money; she knows the whole secret," (page 124;) "Benson has nothing to do with the murder, *only Mary*," (page 125;) "*she will confess*," (page 124.)

The letters show that Benson had read or heard that he had been accused by Mrs. Rautzahn, who had also said to the police, that "the money had disappeared" with her mother. The above and other like clauses were as clearly intended for the police authorities as if a direct request had been made to them to push their investigations to the fullest extent to discover the truth. While he is neither a lawyer nor a scholar, he is not a fool—and if *he* had been "guilty of the murder," and she should be *compelled* to disclose (as he plainly desired she should be) to whom "she had given the money," *and the recipient* should be found to be "the murderer," he was surely notifying the police that he himself was the guilty person; hence his requests that she should be compelled to disclose, in view of his repeated declarations of his own innocence, would be simply idiotic. What then? Whether or not he writes "poor German," he is incapable of speaking or writing "good English." While he must have known that "murder" was a crime, and while the law for certain purposes presumes that every man knows the law, the only rational explanation is, that he did not know that it is a crime to aid or assist in secreting the evidence of a crime already committed by another; and he evidently meant, (so the letters show,) that the person *who had stolen the money* had committed the "murder"—and that "*only Mary*" *knew it all*, and that she "would confess," when charged

with the theft, and required to tell what she had done with the money she had stolen. It seemed to us at the trial, and it seems now, that Benson should have had an opportunity to explain why he wrote as he did, and what he intended; and we think it was error to refuse him that right.

MRS. RAUTZAHN'S COMPETENCY AS A WITNESS.

The second assignment of error (printed record, page 236) is, that "the circuit court erred in ordering separate trials to the defendants, at the instance and on the motion of the U. S. District Attorney." At page 4 of the printed record it will be seen that on the first day of the term—

The District Attorney, "for and on behalf of the United States moves the court for a severance of the defendants on the trial of this cause; and it appearing that good reasons exist for allowing a separate trial of the defendants, it is ordered by the court, that said defendants be proceeded against and tried separately for the offense charged in the indictment."

Neither Benson nor any counsel representing him was in court when this order was made. The indictment in each of its three counts charges "that C. A. Benson *and Mary Rautzahn*, on," etc. The two were charged jointly as principals in the first degree. Nowhere in the indictment is Mary Rautzahn charged as an "accessory," either before, or after the fact. The indictment was found in the district court on 13th October, and was certified and filed in the circuit court on 29th October 1890. The circuit court convened at Leavenworth on the 1st day of June 1891. Benson had not been arraigned for plea when the order of severance was made. Why was that order made? The record does not show that either of the defendants made any application for a severance, and certain it is that Benson had not made any such application. If it is competent for the government to ask or demand a severance, in cases of this character, for some purpose of the government, the record ought to show some sufficient rea-

son why such an extraordinary proceeding is taken. Upon the face of the record, the order for a severance was illegally made, and was erroneous.

Whether the order for severance was illegal or not, it was undoubtedly asked by the district attorney that he might call Mrs. Rautzahn as a witness for the government against Benson. She was called as such witness; (printed record, page 125.) It was then objected upon the part of Benson that she was incompetent to testify in the case, it appearing that she was jointly indicted with Benson as principal in the first degree, and that a *nolle prosequi* had not been entered as to her, and that the indictment was still pending against her. The court promptly overruled this objection, to which an exception was saved. The objection to her competency is renewed in the 2d and 4th grounds of the motion for a new trial; (page 233.)

Was Mary Rautzahn a competent witness for the government against Benson? We say no. Chapter 17 of Title 13, U. S. Rev. Statutes, relates to "evidence." Section 858 relates to the competency of witnesses in *civil* actions. After prescribing certain rules respecting their competency, the following sentence occurs:

"In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Subsequent sections of that chapter protect witnesses against testimony given by them in certain matters, or obtained in certain judicial proceedings, thus showing the sacred character of certain kinds of testimony, and the "privilege" of parties in respect thereto. But all the provisions of said chapter 17, if applicable in *criminal* trials under the practice of federal courts, do not tend to determine the question of Mrs. Rautzahn's competency as a witness for the government against Benson; nor does the act of congress approved 16th March 1878 determine the question of her competency. This last act is ch. 37, 20 U. S. Stat. at Large, page 30, and is entitled "An act to make

persons charged with crimes and offenses competent witnesses in the United States and Territorial courts." The act is as follows:

"*Be it enacted*, &c., That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, *at his own request, but not otherwise*, be a competent witness; and his failure to make such request shall not create any presumption against him." (Supplt. to U. S. Rev. Stat., p. 155.)

The evident intent of this statute was and is, to allow the *defendant who is on trial* to testify in his own behalf if he wishes to do so. It gives no other or greater right. It does not apply to any person not on trial. In the case at bar, Benson only was on trial. The act does not mention "co-defendants," nor by any intendment or construction does it include "co-defendants" *unless they are on trial jointly*, and then, under this act, they are competent witnesses for themselves only, not for the government. As to "co-defendants" not on trial, the rule as to their competency as witnesses is not changed by this act of 1878. But if that act can be construed to make a co-defendant not on trial a competent witness, still "the person so charged" can testify only "*at his own request*"—and no request by or for Mrs. Rautzahn appears in the record. Not being on trial herself, she could make no request to testify "in her own behalf." Even if she desired Benson's conviction, (which is very evident from her testimony,) it would have been a novel feature for her to *offer herself* as a witness against him, and to "request" that she might testify, and have such offer and request appear *in the record*. It does not so appear. The record is, (page 125,) "Mrs. Rautzahn, a witness *called on behalf of the plaintiff*, being sworn," etc. The court will not presume that the record is false, and that she testified "at her own request."

This court, in *Logan v. United States*, 144 U. S. 263, decided that § 858 of Rev. Stat. had no application in criminal causes. In many respects the decision is instructive here.

Until the passage of said act of 1878, defendants in criminal cases were not competent to testify *for themselves* even, in the federal courts. A change so radical was not made without due deliberation and consideration. Had it been the intent of congress to make "co-defendants" competent witnesses *against each other*, that intent or purpose would have been clearly expressed in the statute; hence, as the act stands, the rule of common law as to co-defendants has not been changed by any congressional enactment.

THE COMMON-LAW RULE.

The rule of the common law was, as we understand the books, that a co-defendant, jointly indicted as a principal in the first degree, and against whom the indictment was still pending and undetermined, was not a competent witness *for the crown* against his co-defendant, and this, whether the trial was joint, or several. There are grave doubts whether he was under the same circumstances a competent witness *in behalf* of his co-defendant. A majority of the English cases hold against his competency. Russell and Wharton, speaking of the common-law rule, both state that "accessories" and "co-defendants" *jointly indicted* are incompetent; while the rule was, and still is, that if *not* indicted at all, or if indicted *separately*, accessories and accomplices are competent. Whatever reason there may be for this distinction, or however inconsistent the two rules may appear to be, the fact remains, that the two rules as stated were the rules of the common law. The exceptions found in the books are so few as hardly to constitute substantial exceptions.

The question is not a new one either in the American reports, or in American text-books. The books are full of confusing and contradictory propositions, arising mainly from the failure to observe or state specifically the status of the party whose competency or incompetency is asserted or denied. Russell, and Greenleaf, and Wharton, often state propositions in general terms, sometimes the one way,

and sometimes the other, failing to note whether, in the case cited as an illustration, the party called as a witness was a "co-defendant" jointly indicted as a "principal," or jointly indicted as an "accessory," or whether separately indicted, or not indicted at all. As the word "accomplices" includes *all particeps criminis*, whether indicted or not, the use of that word alone, as is often the case, where stating the rule, or the application of the rule respecting the competency of an "accomplice" as a witness, is often misleading. A few illustrations are not out of place:

Prof. Greenleaf in his work on Evidence, vol. 1, § 363, states the rule correctly, thus: "In regard to defendants in criminal cases, *if the state* would call one of them as a witness against others *in the same indictment*, this can be done *only by discharging him from the record*, as, by the entry of a *nolle prosequi*," or order for his dismissal, or by verdict, and the like. But in § 379 he says, that "a *particeps criminis* is not, so long as he remains not convicted and sentenced, an incompetent witness" merely on account of being a *particeps criminis*. This is misleading in not plainly saying, "and when not *jointly* indicted." But in the same section Greenleaf says "the usual course is to leave out of the indictment those who are to be called as witnesses"—thus plainly suggesting that, by being *jointly* indicted, they are incompetent or not, as an indictment is or is not pending and undetermined as to them.

In 2 Russell on Crimes, 596, the author says, that "one of two or more accomplices who is *not indicted* may be a witness against the other," thus suggesting the general rule as he understood it. But he adds, that an accomplice *jointly indicted* with others may also be a witness against his co-defendant, (citing 2 Starkie's Ev. 13;) but this is misleading in not stating clearly, that *such witness* had either "pleaded guilty," or been tried and convicted, or that a *nolle* had been entered as to him, before being offered as a witness.

In the Sacia case, (known as the Lewis Will Case,) tried in 1880 before the U. S. District Court of New Jersey, (2 Fed. Rep. 754,) the case being one for conspiracy to defraud the government, it is said in the opinion, that "the rule of law undoubtedly is, that accomplices are competent witnesses"—not a word of qualification or explanation as to their being or not being *jointly indicted*, or not indicted at all, or that the prosecution as to the witness had been ended in some way; and this careless phrase of the trial judge is carried into the syllabus, and the index—thus misleading the hasty or careless reader. And yet the report of the *Sacia case* shows, that Jane H. Lewis, who had been called to testify against Sacia, and who was the witness whose competency to testify was recognized by the court, had been indicted with Sacia and several others, and had pleaded guilty, thus ending the prosecution as to her, before she was called as a witness for the prosecution.

Let us look at some of the English cases most frequently referred to as stating the "rule of the common law": *The King v. Desmond*, Noy's Rep. 154—decided in 1668. The following is a literal report of the case so far as it relates to the question at bar:

"In the Star Chamber between the King ex-relatione of the Deputy of Ireland, and the Lord Desmond, Sir Percy Crisby and their defendants, it was resolved: 1.–That if there be divers defendants, and one of them does not accuse himself, but accuses *his companion*, *another defendant*, he shall not be received as a competent testimony to condemn his companion; but if he *accuse himself*, then he should have been received as a competent testimony to condemn his companion."

That is, if each pleads *not guilty*, then neither, although separately tried, shall be allowed to testify against his "companion," or co-defendant; but where he has "accused himself" *by pleading guilty*, then he is competent.

Rex v. Davis, 3 Keble, 136—was decided in the 24th year of the reign of Charles II, (which would be 1684.)

The entire report occupies not to exceed ten lines, and is as follows:

"*Dominus Rex and Davis*, &c., Monday, February 10. In an indictment for murder against him and 13 others hired by Sir Philip Howard to keep possession, for killing one that came in aid of the constable on a justice of the peace's warrant, he was admitted a good witness, notwithstanding the bill of murder found against him by the coroner or grand jury, *there being nothing in proof against him of the fact upon the evidence, nor that he assisted.*"

While the report of the case is silent in that respect, the rule then was, that when the crown closed its case, and it appeared that there was "nothing in proof" against one of the accused he was discharged from the record, and was thereby rendered competent as a witness, notwithstanding the joint indictment.

The case of *Rex v. Lafone, Hopburn, Davis, Billiter, and another*, 5 Espinasse, 154, was decided in 1804. It was a *joint indictment* against five persons for obstructing one Jonathan Rodgers and others, who were solicitors of leather appointed under an act of parliament of the city of London, in the execution of their duty. *Lafone* alone pleaded *not guilty*. Davis and the other three defendants *suffered judgment to go against them by default*. The trial was before Lord Ellenborough. Erskine, of counsel for *Lafone*, proposed to call the other defendants to give evidence on the part of *Lafone*. Lord Ellenborough expressed doubt as to the legality of admitting him. He said:

"In case of a *joint indictment* against several for a *joint offense*, I have never known this evidence offered, and I think it cannot be admitted. To allow this evidence would go to every criminal case, for if two were indicted, one, by suffering judgment by default, might protect the other. There is *a community of guilt;* they are all connected in an unlawful proceeding; the offense *is the offense of all*, and not the act of the individual only."

The case of *Regina v. Simon Lyons*, 1 Car. & Payne, 555, was tried before Mr. Justice Erskine. The indictment was against Lyons as a receiver of stolen property, with a

count against James Edward O'Brien, a lad or boy, for stealing money, containing a statement that Lyons incited the boy to commit the felony. The prosecuting witness was the father of defendant O'Brien. The boy in the absence of Queen's counsel had pleaded guilty. Mr. Jones, Queen's counsel, stated that *he wished to use the lad as a witness against Lyons*, and for that purpose desired to have the plea of guilty withdrawn, because he did not wish the witness to be under the stigma of a conviction of felony. The following appears in the report of the case:

"ERSKINE, J., doubted if this could be done.

"MR. JONES: The person may be examined as a witness *previous to conviction*.

"ERSKINE, J.: Not where *he is indicted under the same indictment*. I never heard of such a thing.

"MR. JONES: But this is not an indictment against the principal, but an indictment against *an accessory* for a substantive offense.

"ERSKINE, J.: If the lad himself desires it, I will allow him to retract his plea of guilty, and not call on him to plead again now. When he is called as a witness then will arise the question, whether he, *being himself charged in the same indictment*, can be a witness or not. The boy may have nominal sentence passed on him, and then he will be a competent witness.

"MR. JONES then inquired what was to become of the lad till the questions were ultimately decided, and being notified by his lordship that he must remain in prison, stated that he would rather under such circumstances that he should plead guilty and receive a nominal punishment. *This was accordingly done.* The lad pleaded guilty to all three charges, and was sentenced to imprisonment for one day on each. The trial of Lyons then proceeded, and the lad was examined as a witness against him."

Now here, the rule is not only plainly stated by Mr. Justice Erskine, but the usual practice in all such cases fully appears.

The case of *Regina v. George and Ford*, 1 Car. & Marsh., page 111 original edition, (page 66 American edition,) was tried at Abbington Assizes in 1841. It was a joint

indictment for house-breaking, and stealing bacon, etc. *George pleaded guilty*, and Ford pleaded not guilty. At the trial Ford proposed to offer George as a witness to prove that he (Ford) was not present at the committing of the offense. He was allowed to do so.

The Queen v. Gerher and 3 others, 1 Temple & Mew, 647—(Crown Cases;) tried in 1852. *Four* were jointly indicted. *Three* were placed on trial. Counsel for *two* of the three objected to the *fourth* being examined as a witness for the crown *against* his clients, but the testimony was received. The report does not show whether a *nolle* had been entered, or that the witness had been otherwise discharged. On appeal, the opinion is by Williams, J., and is thirteen lines in length. It suggests "as a probable reason" for allowing the testimony (in the trial court) "the *inconvenience* that would result if the party called as a witness was at the time actually upon his trial;" and the court says this rule "has been settled for more than a century!" No authorities are cited in the opinion. The English reports for two hundred years show clearly that, where the indictment was joint, and was still pending and undetermined, the rule was settled *against* the admissibility of a co-defendant.

An examination of some American cases may be instructive: *The People v. Bill*, 10 Johns. 95, was a joint indictment against Bill and another. Each pleaded not guilty, and Bill elected to be tried separately. The trial was in 1812. No person was present at the commission of the supposed offense except the prosecutor and the two defendants. After the prosecution rested, defendant Bill offered his co-defendant as a witness. The district attorney objected because *he was jointly indicted* with defendant Bill. The opinion of the court is as follows:

"It appears to be a technical rule of evidence, and one well settled, that *a party in the same suit or indictment* cannot be a witness for his co-defendant until he has been first acquitted, or convicted. Whether the defendants be

tried jointly or separately does not vary the rule. It is his *being a party to the record* that renders him incompetent, and the practice is, when nothing appears against one of the defendants, for the court to direct his immediate acquittal, so the other defendant may use him as a witness. (Hale's P. C. 306; Peake's Ev. 100, note; 6 Term Rep. 623.) In the case of *Rex v. Fletcher*, Stra. 633, where two were indicted for an assault, and one submitted, and was fined, and paid it, the chief justice allowed him to be a witness, '*the matter then being at an end as to him.*' But in the late case of *Rex v. Lafone* and others, 5 Esp. N. P. 155, Lord Ellenborough would not allow a co-defendant, on a joint indictment for a misdemeanor, to be a witness for the other, though he had let judgment go by default, for he said that one defendant in that case might always protect the other, and he had never known that evidence offered. The witness in the present case was therefore legally excluded."

Among the later cases relied upon to support the claim that under the common-law rule a co-defendant is a competent witness for the crown or government against a co-defendant jointly indicted, is that of *The State v. O'Brien*, 3 Vroom, (32 N. J. Law) 414. The defendants were jointly indicted for conspiracy. Smith pleaded not guilty, and was put on trial separately. O'Brien who had not pleaded at all was offered by the state as a witness against Smith. The court admitted the witness, and error was assigned. The supreme court affirmed the decision. The opinion discusses the question at length, cites the authorities generally, and concludes that the question is an open one in New Jersey; and thereupon the court proceeds to settle the practice in that state, not upon "authority," but according to the best judgment of the court; and it held, that the testimony of the witness was properly received. The case is not authority either way in determining what was the rule at common law.

Several of the later cases, and among them the New Jersey case above mentioned, cite Roscoe's Crim. Evidence. This is another work that boxes the legal compass

on the competency of witnesses in criminal cases; (7th Am. ed., 127, 128.) In speaking of witnesses who are incompetent, Roscoe in one place says, "an exception was *always made* in the case of an accomplice who was *willing* to give evidence"—which is not true except where the accomplice was not indicted at all, or was separately indicted; and the author fails to state the *status* of the "willing" accomplice. At the same page (127) Roscoe in the text cites four cases where the court *refused* to permit an accomplice to testify *for the crown*, in one of which the accomplice "had pleaded guilty." At page 128 the author says—

"It is quite clear, that an accomplice is a competent witness *for the prisoner* in conjunction with whom he himself committed the crime," "but if he is charged *in the same indictment* he cannot be called until after he has been acquitted, or convicted, or a *nolle prosequi* has been entered."

This states the rule at common law; but one cannot read pp. 127 to 131 of Roscoe without feeling that he misconstrues or carelessly states the facts of the cases he cites. A careful examination of the cases, both English and American, cited as declaring the common-law rule, will show that that rule was, that an accomplice or co-defendant jointly indicted as a principal, was not a competent witness, either for the crown, or for his co-defendant on trial, until he had in a proper manner been discharged from the record as a party, or had been acquitted, or convicted. If therefore the "common-law rule" respecting the competency of witnesses in criminal causes obtains in the federal courts, Mrs. Rautzahn was incompetent to testify against Benson, and the judgment should be reversed.

THE STATUTE RULE IN KANSAS.

Some district and circuit courts hold that where the state in which the federal court is held has by statute determined the qualifications of witnesses in criminal causes, such state rule becomes the rule of the federal courts held in such state. If this be the law, then most surely it was

error in the court below to allow Mrs. Rautzahn to testify. Sec. 229 of the Kansas criminal code is as follows:

"SEC. 229. When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the state. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed be discharged by the court for the purpose of giving testimony for a co-defendant. The order of discharge is a bar to another prosecution for the same offense." (Gen. Stat. 1889, par. 5297.)

This statute was enacted in 1859, and has been upon the statute books of Kansas ever since. It has never been before the state supreme court for construction, although the "notes" to par. 5297 of Gen. Stats. of 1889 would indicate otherwise. These "notes" so far as they relate to the cases of *The State v. Craft*, 3 Kas. 450, and *Cummings v. The State*, 4 Kas. 225, are misleading, as supposed constructions of said § 229. The report shows there were two separate indictments — one against Craft and Campbell, jointly, (4 Kas. 452, 456, 478,) and a separate indictment against Molly Brown and Lu Ferguson, (4 Kas. 453, 456, 473, 479.) A severance was asked and ordered as to Craft and Campbell. On the trial of Craft, Molly Brown was offered as a witness for *the state*, and was objected to on the ground that she was an "accomplice." She was permitted to testify — rightly, because she was not a "party to record," not jointly indicted with Craft; and hence, a *nolle prosequi* was not necessary to render her a competent witness. In the case of *Cummings v. The State*, 4 Kas. 225, an information was filed against Reed and Cummings jointly, to which they pleaded. Afterward, (page 226,) *a nolle* was entered as to Cummings, and a *separate information* filed against him. Reed was put on trial, and Cummings was used as a witness for *the state*. He was not a "party to the record," being no longer a "co-defendant," and was not incompetent under the "com-

mon-law rule." The *nolle* had made him competent under the statute to testify against Reed, whatever might be the effect of the new information as to himself.

What office then, does said § 229 of the Kansas criminal code perform? Simply this: it recognizes as a rule of law, that "where two or more persons are included *in the same prosecution*," whether by indictment or information, they are and each is *incompetent to testify as a witness either for the state*, or *for a co-defendant*, so long as such indictment or information remains pending and undetermined as to them or him; and it prescribes a plain and simple but certain rule, whereby *the state* may make any one of such co-defendants a competent witness *against another co-defendant* — that is to say, before the state rests its case, and "before the defendant has gone into his defense," the prosecutor may enter a *nolle prosequi* as to any defendant, and discharge him from the record, and then use him as a witness. It also, with a humane spirit of justice, prescribes the simple and equitable rule, that when the state has closed its testimony, if it shall appear that "there is not sufficient evidence" against any one of the defendants "to put him on his defense," such defendant may be "discharged *by the court* for the purpose of giving testimony *in favor of a co-defendant*."

That is the office which said § 229 performs. If the rules which it plainly prescribes were the "rules of the common law," then and theretofore in force "as common-law rules," the section simply crystalizes them by removing all doubts and uncertainty, and prevents any conflicting decisions as to their meaning or application. If the rule of the common law was not what we have claimed it to be, but on the contrary such rule allowed the state or government to call and use one co-defendant as a witness for the state against another co-defendant without discharging him from the record, then the Kansas statute abrogates that rule, and prescribes a wiser and safer rule in its place. But in either case, *the statute of Kansas* furnishes the rule

for the courts of Kansas, and under that rule a co-defendant, jointly indicted with another as a principal in the first degree, cannot in any court of Kansas be legally called or permitted to testify as a *witness for the state* against his co-defendant while such joint indictment is pending and undetermined as to him; and if such *statutory rule* obtains as a rule of evidence in the federal courts, then it was fatal error to permit Mrs. Rautzahn to testify as a witness against Benson.

OTHER ASSIGNMENTS OF ERROR.

6th. A request was made by counsel for Benson, that the jury be permitted to go to the *locus in quo*, and view the premises, and the court stated he would make an order to that effect. When the government rested, the request for the order was renewed, and the court then refused it, saying, that "the authorities are in conflict upon the question" as to the power of the court to send the jury to view the premises. Clearly, if the court had the power to make the order asked for, it was error to refuse it; (printed record, pp. 110, 176, 236.)

* * *

8th. On her cross-examination, (printed record, p. 153,) Mrs. Rautzahn was asked if she had not stated to her father in the jail, "in the presence of James Doane and others, that he need not be afraid of any blood on the horse," etc., when the court instructed the witness not to answer, saying that it "is not cross-examination in any sense of the word;" and added, "her trial is yet to follow." No objection had been made by counsel for the government. She had testified to a state of facts which made it perfectly competent to show that she knew and had admitted other facts which were calculated to weaken or destroy her previous testimony. It was a legitimate inquiry under the latitude of cross-examination. Nor is a court bound to advise any witness in any case, that he need not answer a

question, unless it be where the answer will tend to convict the witness of a criminal offense, or to expose him to infamy or disgrace. In the present case, the witness, who was in custody under indictment for felonious homicide, was called by the government to testify against a co-defendant. No testimony given by her under such circumstances could be legally used against her upon her trial which was "to follow." Nor could any answer which she could make tend to her disgrace or infamy. She had already testified to sufficient facts to show that there was no lower depth for her. It was error to arrest the cross-examination.

* * *

9th. At pages 154, 155, printed record, Mrs. Rautzahn was interrogated respecting certain conversations with Mr. Doane, (then chief of police,) shortly after her arrest for the murder of her mother. She had denied making a particular statement to Doane at a time and place mentioned, and was then asked if she had "told him that, at any other time and place." No objection was made by government counsel — but the record (page 155) shows this:

"THE COURT: That you need not answer. I presume the cross-examination is for the purpose of impeachment, and she is entitled to time and place."

It was perfectly competent to cross-examine the witness as to any statement, fact, or matter, upon which her answer would weaken or destroy the value of the testimony she had already given. No "time" or "place" was necessary to be stated to make *the question* competent. Where these are omitted, the examiner takes the risk of the answer being against him or his theory of the case, and takes that risk without any remedy if he fails to fix "time and place" so as to be able to impeach the witness. It is indeed a novel feature in the "law of evidence," that no question calculated to elicit the truth, calculated to show that the witness has testified falsely or corruptly, or even ignorantly and mistakenly, can be put on cross-examina-

tion, unless such question be so framed with respect to "time, place, and person," as allow the calling of witnesses for the purpose of "impeachment." We were entitled to the question, and an answer. If, not being satisfied with the answer, we sought to impeach the witness, then, *but not till then*, could the objection be legally made that we had not laid the proper foundation.

THE VERDICT — ITS EFFECT.

The 3d ground stated in the motion in arrest of judgment (page 234) is, that —

"The verdict of *not guilty* as to the second and third counts of the indictment operates as (and in judgment of law is) an acquittal upon the first count of said indictment also."

The 15th and 16th assignments of error relate to the effect of the verdict. The verdict is as follows — page 233 :

"We, the jury in the above-entitled cause, duly impaneled and sworn, upon our oaths find the defendant C. A. Benson guilty of murder as charged in the *first count* of the indictment, *and not guilty upon the second and third counts as charged in the indictment.*"

Attention was called, ante page 3, to the fact, that the *first* and *second* counts of the indictment are precisely alike, except that the word "head" occurs twice in the *first* count, and does not occur in the second count, while the word "neck" occurs twice in the *second* count and does not occur in the first count; and that the *third* count differs from the first and second in this, that it charges that the assault was made "with a certain dangerous weapon, to-wit, a sand-bag, club, or other blunt instrument," and that the wound was inflicted upon *the back part of the head* of said Teresa Mettman, while the weapon described in the first and second counts is "a certain revolving pistol." (Printed record, pp. 1 to 3.)

The case here, and the effect of the verdict here, is not as in those cases where the jury return a "general verdict" upon an indictment containing several counts, nor as in

cases where the verdict responds to one only of several counts, and is silent as to the others. Here, the verdict of *not guilty as to the third count*, is an absolute acquittal as to that count, and as to any charge for committing the crime of murder by means of a "sand-bag, club, or other blunt instrument." And the verdict of *not guilty as to the second count*, is an absolute acquittal not only as to that count, but of the charge of having committed the offense "with a certain revolving pistol" by discharging and shooting off the same, and thereby, with the leaden bullets discharged therefrom, "striking and wounding the deceased "in and upon the left side of the NECK," "about two inches posterior to the left ear" of the deceased, etc. *Why is not this an absolute acquittal also as to the first count*, where the supposed offense is alleged to have been committed "with a certain revolving pistol" by discharging and shooting off the same, and thereby, with the leaden bullets discharged therefrom, "striking and wounding" the deceased "in and upon the left side of the HEAD," "about two inches posterior to the left ear" of the deceased, etc.? Is it a matter so momentous, whether the wound or a shot was made "upon the left side of the *head*," or "upon the left side of the *neck*"? If it is, then is it not equally momentous, whether that wound was made "about two inches *posterior to the left ear*," (as charged in the indictment,) or "on the left side about *two inches back of the eye*," or, "in the back of the head, two inches back of the *left eye*," or, "two inches from the *left eye, back*"? The three descriptions last quoted were given by Doctor Thomas, at page 78, when the District Attorney was getting him to fix its location; and Doctor Goddard located the wound as being "*right back of the left eye*," (page 82,) and again, as "two inches back of the *left eye*," (page 84.) There is not one word of testimony showing or tending to show that the *gunshot wound* was "about two inches *posterior* to the *left ear*," or that it was "posterior" or *behind* the "left ear" at all. The testimony appearing in the rec-

ord supported the *second* count just as fully as it did the *first count;* and when the jury returned a verdict of "not guilty" as to the second count, it operated as an *acquittal*, both as regards the indictment and the evidence, as to both the first and second counts—and it was error to overrule the motion in arrest of judgment, and error to pronounce sentence upon the verdict. Upon this ground alone, if the court below had jurisdiction to hear and determine the cause, the judgment should be reversed, and the plaintiff-in-error should be discharged.

This case is momentous in many respects. For the plaintiff-in-error, it involves the question of life, or death. Whether political jurisdiction over the Fort Leavenworth Military Reservation, is vested in the federal government, or in the state of Kansas, ought to be settled for the benefit of both governments. Whether a wife will be allowed to be placed on the stand as a witness against her husband in a criminal cause, and permitted to testify concerning communications made by him to her during the marital relation, (if not settled in *Bassett v. United States*, 137 U. S. 496, 505,) and whether one of two co-defendants, jointly indicted as principals, can testify for the state or government against the other, while that indictment is pending and undetermined as to both, are questions which should be settled beyond further controversy.

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Of Counsel.

146 U.S. 325

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Supreme Court of the United States.

OCTOBER TERM, 1892.

C. A. BENSON (IMPLEADED, ETC.), plaintiff in error,
vs.
THE UNITED STATES.
} No. 1007.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1892.

C. A. BENSON (IMPLEADED, ETC.), plaintiff in error,
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THE UNITED STATES.
No. 1007.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT.

The defendant was indicted as C. A. Benson. He was at divers times also called Charles Benson, Arthur Felton (fol. 153), Carl Albert Benson, and Richard Waldo (fols. 114 and 166). He was tried in the circuit court of the United States for the district of Kansas, in June, 1891, was found guilty (p. 9), and was sentenced to be executed (p. 1).

Divers errors are alleged to have been committed upon the trial.

The defendant, Benson, was indicted jointly with one Mary Rautzahn for the murder of one Teresa Mettman, who was the mother of said Rautzahn.

The indictment was found in the district court of the United States in and for the first division of the district, at the October term, 1890, and the case was duly certified to the circuit court (pp. 1, 4).

The indictment consists of three counts:

It is charged by the *first* count that the killing was done with a revolving pistol, and that the bullet struck and penetrated the left side of the head of the deceased about 2 inches posterior to her left ear, inflicting a mortal wound of the depth of 4 inches and of the width of half an inch, of which she instantly died.

The *second* count charges the killing in the same terms, except it is alleged that the bullet struck and penetrated the left side of the neck of the deceased about 2 inches posterior to her left ear, inflicting a mortal wound of the depth of 4 inches and of the width of half an inch, of which she instantly died.

The *third* count charges that the killing was done with a "sand-bag, club, or other blunt instrument."

The crime is charged to have been committed March 23, 1890, at the Fort Leavenworth military reservation, in the first division of the district of Kansas, "the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court."

June 1, 1891, the circuit court duly ordered that the said defendants be proceeded against and tried separately for the offense charged in the indictment (p. 4).

June 2, the defendant, Benson, impleaded, etc., demurred to the indictment, first, that it does not state facts sufficient to constitute a public offense against the laws of the United States; second, that the court has no jurisdiction. (*Id.*)

June 4, the demurrer was argued, submitted, and overruled (p. 5), and said defendant, Benson, was arraigned and pleaded not guilty (p. 6), a jury was selected, and the separate trial of Benson was proceeded with at Leavenworth before Judge Riner and the jury (pp. 6 to 233).

June 10, the jury found "the defendant, C. A. Benson, guilty of murder as charged in the first count of the indictment, and not guilty upon the second and third counts as charged in the indictment" (pp. 9 and 233).

A motion in Benson's behalf was filed and argued to set aside the verdict and to grant a new trial, which motion was overruled (pp. 9 and 233).

A motion in arrest of judgment was also filed and argued and was overruled (pp. 9, 10, and 234). These rulings were excepted to.

Said defendant was sentenced to be hanged on the 5th day of November, 1891.

THE CRIME.

The offense upon which the trial rests is shown by the transcript of record to have been preceded by immoral relations existing between Benson and the murdered woman and between him and her daughter, the witness, Mary Rautzahn; the crime was mercenary in its motive and the details of its execution and of the dismemberment of the body show it to have been cruel and shocking almost beyond precedent.

The Mettman family (excepting two small children belonging to Mrs. Rautzahn) consisted of the husband, John Mettman, the wife and mother, Teresa Mettman, the daughter, Mary Rautzahn, and a grown-up son, Henry Mettman, who worked for the Rock Island Railroad Company and who had $440 in $20 gold pieces in the custody of his mother and sister.

The daughter had been living with Benson as his wife, at Kansas City, while his own wife and daughter (who knew nothing of this liaison) remained at Leavenworth. The mother was murdered and her remains were dismembered, weighted with rocks, and sunk in the Missouri River; the gold was passed over by the daughter to Benson, who carried it to Kansas City, and the story went out that the mother had disappeared with the gold.

ARGUMENT.

The questions brought before this court by writ of error, issued in response to the petition of the defendant below, are set forth in sixteen assignments of error (pp. 235, 238), which counsel for the defendant in error here begs to classify under the following:

POINTS.

I.

THE MURDER CONSTITUTED A PUBLIC OFFENSE AGAINST THE LAWS OF THE UNITED STATES AND WAS COMMITTED WITHIN THE JURISDICTION OF THE FEDERAL COURT.

(*a*) The demurrer to the indictment is understood to have raised the question of jurisdiction. (Fol. 10.)

The first assignment of error (p. 235) presents the same question; it is also set forth in the first and second grounds of the motion in arrest of judgment; (p. 234) and the thirteenth and a portion of the fifteenth assignments of error (p. 237) refer to the same objection.

The brief of counsel for plaintiff in error has not yet come to hand, but it is assumed that the contention in Benson's behalf is that the Federal court has no jurisdiction to try one who commits a murder within the limits of the Fort Leavenworth military reservation.

The counterpart of this contention must be that the murderer goes free or that he is subject to trial before and only before a State court.

(*b*) By section 5339, Revised Statutes:

> Every person who commits murder * * * within any fort, * * * or in any other place or district of country under the exclusive jurisdiction of the United States: * * * shall suffer death.

If the defendant discharged the pistol that produced the fatal wound under the circumstances set forth in the indictment, the act was unquestionably murder at common law, and therefore under this statute.

United States v. *Outerbridge* (5 Saw., 620); *United States* v. *Coppersmith* (4 F. R., 205); *Gould & Tucker's Notes*, p. 1000.

The evidence that the act of killing occurred upon the military reservation is scarcely contended against and the finding as to the place of the act is conclusive.

By section 711 it is enacted that—

> The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States:
>
> First. Of all crimes and offenses cognizable under the authority of the United States.

It goes without saying that if the territory comprising the reservation as it was in March, 1890, had never passed from the United States to the State the Federal court would have been vested with full jurisdiction.

The United States transferred jurisdiction to the State by the admitting act of January 29, 1861 (12 Stat., 126), and received and resumed the same by the State's enactment of February 22, 1875, and was thereupon reinvested with all political, legislative, and judicial jurisdiction, excepting such reservations as are made by the State enactment.

(*c*) By the seventeenth subdivision of section 8 of article I of the Constitution, Congress is given power to exercise exclusive legislation over the district which shall become the seat of Government "and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts," etc.

Paschal's Notes (3d ed., p. 137), include the following:

> The right of exclusive legislation carries with it the right of exclusive jurisdiction. *United States* vs. *Coryell*, 2 Mas., 60, 91; 6 Opin., 577. Even to recapture by military force. 9 Op., 521. This second clause binds all the United States. (*Cohens* v. *Virginia*, 6 Wheat., 224.) Story's Const., sec. 1229.

> Congress has the right to punish murder in a fort or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States. (Idem.) The power to legislate in these places ceded by a State carries with it as an incident the right to make that power effectual. *Cohens* v. *Virginia*, 6 Wheat., 428. Congress does not act as a local legislature, but exercises this particular power like all other powers in its high character as the legislature of the Union. (Id.; Story's Const., sec. 1234.) But the purchase of lands by the United States for public purposes within the territorial limits of a State does not of itself oust the jurisdiction or sovereignty of such State over the lands so purchased. *United States* v. *Coryell*, 2 Mas., 60.
>
> * * * * *
>
> After a cession by a State it can not take cognizance of any acts done in the ceded places after the cession. And the inhabitants of those places cease to be inhabitants of the State and can no longer exercise any civil or political rights under the laws of the State.

(*d*) It is a matter of historical record that the lands of the reservation were included within the cession made to the United States by France, and that in 1827 a site was selected by Col. Leavenworth to be used by the United States as a military post.

It is stated that "the region was wild and the cantonment was one for shelter rather than for defense." *United States* v. *Stone* (2 Wall., 526).

There were several surveys and changes were made from time to time in the boundaries. (Id.)

House Mis. Doc., second session, Forty-seventh Congress, vol. 19 (pp. 251, 749), states the area of the Fort Leavenworth reservation to be 2,750 acres.

In *Fort Leavenworth R. R. Co.* v. *Lowe* (114 U. S., 525), the relations existing between the reservation and the State were considered by this court, and the opinion (delivered by Mr. Justice Field) sets forth the history of the reservation, as follows (pp. 526–528):

> The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas and her admission into the Union, the United States possessed the rights of a proprietor and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original States; that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might, undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion, and legislative power of the United States over the reservation, so long as it should be used for military purposes by the Government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the General Government, but from some cause, inadvertence, perhaps, or overconfidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after

the admission of the State, only the rights of an ordinary proprietor, except as an instrument for the execution of the powers of the General Government. That part of the tract which was actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties.

This defect in the jurisdiction of the United States was called to the attention of the Government in 1872. In April of that year the Secretary of War addressed a communication to the Attorney-General, inclosing papers touching the reservation and submitting for his official opinion the questions whether, under the Constitution, the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859 (11 Stat., 430), and, if so, what action would be required on the part of the Executive or Congress to restore the land to the exclusive jurisdiction of the United States. The Attorney-General replied that the act admitting Kansas as a State into the Union had the effect to withdraw from Federal jurisdiction all the territory within the boundaries of the new State, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to State jurisdiction, and the reservation was not within this exception, and that, to restore the Federal jurisdiction over the land included in the reservation, it would be necessary to obtain from the State of Kansas a cession of jurisdiction, which he had no doubt would, upon application,

be readily granted by the State legislature. (14 Opin. Attorneys-General, 33.) It does not appear from the record before us that such application was ever made; but, on the 22d of February, 1875, the legislature of the State passed an act entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leaveworth Military Reservation," the first section of which is as follows:

> "That exclusive jurisdiction be, and the same is hereby, ceded to the United States, over and within all the territory owned by the United States and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation, in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said reservation in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation, and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises, and property on said reservation." (Laws of Kansas, 1875, p. 95.)

The opinion states that:

> There is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part.

(*e*) In Lowe's case, just quoted from, it is held that the reservation in question was not acquired by purchase with

the consent of Kansas. The rule to be applied, therefore, does not arise out of the constitutional provision of article 1, section 8.

Yet the analogies of construction under that provision may aid in determining the scope of the cession made in this case by the State.

It seems to be clearly decided in the cases arising under that provision that a grant of exclusive legislation carries exclusive legislative, political, and judicial jurisdiction.

The official opinion of Mr. Attorney-General Bates (10 Opins. A. G., 38) recognizes that the power vested in Congress to exercise *exclusive legislation* is equivalent to exclusive jurisdiction.

Mr. Cushing, in an opinion relating to a question of exterritoriality arising at Harpers Ferry (6 Opins., 578), says:

> "Exclusive legislation" signifies exclusive jurisdiction, and this follows, even although the legislature of the State, in its act assenting to the purchase, have not expressly ceded such jurisdiction. It vests in the United States by virtue of the Constitution. (Sergeant's Const. L., p. 350.)

He also cites (p. 579) *Cohens* v. *Virginia* (6 Wheat., 422, 429); Story, Const., sec. 1236 et seq.; 1 Kent, 429; Rawle, Const., 238.

Exclusive jurisdiction in jurisprudence is recognized as going with such jurisdiction in legislation (1 Met., 58, and 17 Johns, 225), and this doctrine naturally follows the cases of *F. L. R. R. Co.* v. *Lowe*, cited, and that of *Chicago and Pacific R. Co.* v. *McGlinn* (114 U. S., 542).

In *United States* v. *Cornell* (2 Mason, 60) the defendant was under indictment for the murder of one Kane, in Fort Adams, in Rhode Island, the place having been purchased by the United States from the State which had relinquished its authority over it. Judge Story refers to the constitutional provision and to the fact that the Territory falls within the exclusive jurisdiction of Congress and that State jurisdiction is ousted, and continues:

> This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State legislature is, by the very terms of the Constitution, by which all the States are bound and to which all are parties, a virtual surrender and cession of its sovereignty over the place. Nor is there anything novel in this construction. It is under the like terms in the same clause of the Constitution that exclusive jurisdiction is now exercised by Congress in the District of Columbia, for if exclusive jurisdiction and exclusive legislation do not import the same thing, the States could not cede or the United States accept, for the purposes enumerated in this clause, any exclusive jurisdiction. And such was manifestly the avowed intention of those wise and great men who framed the Constitution.

It is true that this case, like others cited, is one of "purchase," but it must be admitted that "*exclusive jurisdiction is the attendant upon exclusive legislation*" as clearly and certainly upon a direct grant by a State as upon another procedure of transfer denominated a "purchase." See also Clary's case (8 Mass., 72), and *Mitchell* v. *Tibbetts*, (17 Pick., 298), and *Sharon* v. *Hill* (24 Fed. Rep., 730, 731).

In the case at bar the grant does not, in the words of the constitutional provision, confer merely the power of "exclusive legislation," but the State grants "exclusive jurisdiction" "over and within" the territory which includes the spot where the murder was found to have been committed.

(*f*) The count of the indictment upon which Benson was found guilty charges that the offense was committed:

> At the Fort Leavenworth military reservation, in the district of Kansas aforesaid, and within the first division of said district aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court.

By the form of the assignment of error (p. 236), Benson's counsel assumes that the indictment should charge that the *locus in quo* was "purchased" by the United States "for the erection of a fort, magazine, arsenal, dockyard, or other needful building," or that it was used for such purposes, and this assignment denies that the reservation is "a place or district of country under the 'exclusive jurisdiction of the United States,' as alleged in said indictment."

It must be inferred, almost necessarily, that said counsel contends that the United States can have no exclusive jurisdiction except in the cases where it holds the *locus in quo* as purchaser, but such a contention can not be well founded.

The Congressional document, before cited and known as "The Public Domain," states the whole number of reservations at 179, containing in the aggregate 2,920,580.68 acres of land.

Much of this territory is lands that have never belonged to any State or been purchased by a State's consent, and it can hardly be that the laws have left criminals free to murder there without punishment.

The State is without jurisdiction, as, by the act of 1875, it cedes to the United States "*exclusive jurisdiction*" "*over and within all the territory owned by the United States and included within the limits of the United States military reservation known as the Fort Leavenworth reservation,*" etc.

But it must be remembered that, while the Constitution provides for the one case of a purchase of places lying within a State with the consent of the State, it does not interfere with or limit that natural and necessary jurisdiction and authority which a sovereign or government has over the territory which belongs to it.

The constitutional clause was intended to adjust the relations between the State and General government, and to transfer jurisdiction over the purchased territory.

But nothing anywhere prohibits a State from transferring the authority in question, or prohibits the United States from exercising this granted jurisdiction, or from employing that natural and unquestioned jurisdiction which it exercises over the territory which belongs to it exclusively.

The United States is a legal person and is capable of receiving title and holding lands the same as any other person.

It also possesses the powers which pertain to sovereignty and may exercise the several functions of government over the territory when occasion therefor arises.

When territory within a State is purchased by the United States with the consent of a State, jurisdiction—legislative, political, and judicial—is subject to the authority of Congress.

Where the territory is originally owned by the United States the jurisdictions exist from the nature of Government and by the force of general laws.

Where the conveyance is a grant in the nature of a gift or is one coming otherwise than by way of purchase of lands within a State, it necessarily follows that the triple jurisdiction attaches.

(*g*) The two cases cited, viz, 114 U. S., 525 and 545, and those of *United States* v. *Ward* (Woolw., 17), *United States* v. *Stahl* (id., 192), *United States* v. *Bateman* (34 F. R., 86), and like cases do not support the contention of the plaintiff in error because in none of these cases was there a grant or cession by the State to the United States of jurisdiction over the territory concerned.

It is submitted with confidence that the murder constituted a public offense against the laws of the United States and that it was committed within the jurisdiction of the Federal court.

II.

NO ERROR VITIATING THE VERDICT, JUDGMENT, OR SENTENCE ARISES FROM THE ORDERING OF SEPARATE TRIALS TO THE DEFENDANTS BENSON AND RAUTZAHN AT THE INSTANCE OF THE DISTRICT ATTORNEY.

It appears (fol. 9, p. 4) that on the first day of the court the district attorney moved the court for a severance of

defendants on the trial of this cause, and thereupon the court ordered as follows:

> And it appearing to the court that good reason exists for allowing a separate trial of defendants in this cause, it is, therefore, ordered by the court that said defendants be proceeded against and tried separately for the offense charged in the indictment.

This is all that appears in connection with the question or the ruling.

No preliminary or motion papers appear, the specific grounds rested upon are not set forth, but it was made to appear to the court that good reason existed for allowing a separate trial, and it was ordered. The defendant makes no denial of the existence of the good reason.

The motion was addressed to the discretion of the trial court and no review by this court is justifiable.

Certainly this court will not reverse the action of the trial court on a point of practice, and a minor one at that, without a presentation of the grounds upon which that court acted. Under the statute of Kansas the separate trial was in the discretion of the court (Compiled Laws, pp. 75–77, section 218).

If the action of the court may have been error, there is nothing to show that it was error.

It is not claimed that any exception was taken by Benson to the order, or that any objection was made in relation thereto in his behalf.

The case of *United States* v. *Marchant* (4 Mason, 158, and 12 Wheat., 480) is directly in point. In the latter decision this court, by Mr. Justice Story, said (p. 282):

> Whether, then, prisoners, who are jointly indicted, can, against their wishes, be tried separately, does not admit of a doubt.

III.

NO ERROR WAS COMMITTED IN ALLOWING DEFENDANT'S WIFE TO TESTIFY IN BEHALF OF THE PROSECUTION; OR IN ALLOWING HER TO IDENTIFY WRITINGS MADE BY HER HUSBAND, OR IN ADMITTING THE WRITTEN COMMUNICATIONS AS EVIDENCE.

These questions arising by way of the examination of defendant's wife as a witness on the part of the prosecution are presented by the third, fourth, fifth, tenth, eleventh, and part of the fourteenth assignments of error. (pp. 236, 237.)

And see Rec., pp. 11 to 13, 46; and points 1 and 3 of motion for new trial, p. 233.

(*a*) Mrs. Johanna Benson, wife of the defendant, was called and sworn on behalf of the plaintiff. (11, 13.)

Being unable to speak the English language, her daughter was sworn as interpreter.

The witness is asked to examine certain papers and to say whether she knows the handwriting.

The counsel for the defendant then asked that the court should be satisfied that the witness was the defendant's wife, and continued:

> And then I wish her to be advised that she can not except with her own free will and voluntary consent be used as a witness against him.

The fact of the relation of husband and wife was conceded.

Defendant's counsel then states that:

> Under our State law she may, if she chooses, voluntarily be a witness, but she can not be compelled to be a witness. (P. 12, top.)

He asks that "she be plainly advised, if she is competent at all, that she shall not be required to testify to anything except upon her own free voluntary wish or desire to do so.

* * * * * *

> Whatever your honor determines the law to be respecting her competency under any circumstances is for the court to say, but I wish her advised that she need not testify unless she desires to testify.
>
> COURT. We are governed as to the State law as to that matter, and I will so instruct her if you desire it."

The interpreter is then instructed to tell the witness that—

> As she is the wife of the defendant she may answer the questions if she is willing to, but she can not be compelled to answer; but if she is willing to answer in the interest of justice she can do so.

The answer by interpreter is:

> She says that what she knows and can answer she will testify to.

It thus appears that the wife was sworn without objection, and that upon the instruction and ruling of the court, her testimony was taken without objection.

The entire evidence of this witness comprises less than one page, and is set forth on pages 12 and 13.

The defendant's counsel sits by, apparently assenting to the rule of the State law which he had invoked, and makes no further objection to the receipt of the testimony, and allows the witness to depart without any cross-examination.

Afterwards, and after two witnesses had been examined at length (p. 46), defendant's counsel moved to strike out the testimony of the wife "on the ground that it was incompetent, which motion was overruled" and an exception was noted.

The wife testified to no fact except as to the identification of certain written papers.

She testified that she knew defendant's handwriting, and that two letters, Exhibits A and B, and six slips, marked 1 to 6, were in Benson's handwriting.

That she received A and B through her mail box, that an envelope was around them, and that everything in the letters was at the trial the same as when she got them. This is the sum total of her testimony.

The facts as to the six slips, and as to the two letters are entirely dissimilar.

It does not appear that any of the six slips or unsigned exhibits, marked 1 to 6 (or C to H), inclusive, were sent to or ever received by Mrs. Benson.

It appears from a statement of defendant's counsel in a paragraph near the foot of page 123, that some, if not all, of the slips were found in Benson's room, where he had cohabited with Mary Rautzahn, at Kansas City.

To the same effect is Chief of Police Murphy's testimony (pp. 118, 133, 184), and Rosa Benson refers to the same slips (p. 113).

On page 204 the defendant himself, being examined by his own counsel as a witness, admits that he wrote Exhibits A and B, and thus proves them independently of Mrs. Benson's testimony.

The following excerpt from page 204 shows this:

> Q. I will ask you whether you sat here this morning and heard Mr. Groenfeldt read some letters and some slips?
>
> A. Yes, sir.
>
> Q. And you looked over the slips at the time he did?
>
> A. Yes, sir.
>
> Q. I will ask you if you wrote those papers?
>
> A. I could not tell that; I hardly read them all; may be I wrote them.
>
> Q. Did you write two letters to Mrs. Benson?
>
> A. I wrote some to Mrs. Benson.
>
> Q. Did you write the two letters to Mrs. Benson?
>
> A. Yes, sir; I wrote some to Mrs. Benson.
>
> Q. I will ask you if you wrote that letter to Mrs. Benson [handing witness Exhibit B, indicating other letter]?
>
> A. I should say—I think—yes.

Therefore the case stands, that the wife testifies to the handwriting of two letters which the defendant testifies in his own behalf that he wrote, and there is no contradictory evidence.

If there were any error in receiving the wife's testimony as to the two letters, A and B, received by her from Benson, it would be cured by Benson's independent proof of the fact.

The State v. *Schmidt* (34 Kans., 399, 403); *City* v. *Morse* (40 Kans., 577, 582); *The State* v. *Furney* (41 Kans., 115, 119).

As the slips did not come to the wife from her husband, the only remaining question in this connection is, was it error to prove by the wife the husband's handwriting as to slips material to the trial, and that, so far as the case shows, were never before seen by the witness?

Defendant testifies (p. 204) that he was present when the translator, Groenfeldt, "read some letters and some slips," and that he (defendant) looked over the slips.

His counsel inquired:

> Q. I will ask you if you wrote those papers?
> A. I could not tell; I hardly read them all; may be I wrote them.

On page 221, on cross-examination, witness is asked about Exhibit 1, and says: "I don't know sure that I wrote it; I don't know whether I did or not."

Upon being pressed sharply he denied writing the slips.

(Translations of the letters and slips appear, pp. 173 to 176, 121 to 125, and 205 to 206.)

It is a fair question whether slips that were found in defendant's rooms, and which relate exclusively to his

affairs, and two of which are addressed to his wife (one with his name appended thereto), and three of which speak of himself in the first person, and all of which relate to the murder, or to Benson's relations to the family of the murdered woman, and of which he said "may be I wrote them," are not sufficiently proved without resorting to the evidence given by the wife.

It will be noticed (p. 123) that while the translation of Exhibit 1 is going on Benson's counsel says: "Mr. Benson tells me while this witness is reading that he don't interpret these correctly," etc.; and also that when the corrected translation was compared in court (p. 173), the translator read the rendering, "and defendant, Benson, read the original letters and slips," and no further complaint was here made.

(*b*) It seems to be settled that the rule of a State as to the competency of a witness must prevail in the Federal courts held in such State.

Section 215 of the code of criminal procedure of Kansas, as amended by act of March 2, 1871 (Laws, 1871, p. 280), reads:

> SEC. 215. No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution; or by reason of his being the person on trial or examination; or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting his or her credibility: *Provided*, That no person on trial or examination, nor wife or husband of such person,

> shall be required to testify except as a witness on behalf of the person on trial or examination: *And provided further*, That the neglect or refusal of the person on trial to testify or of a wife to testify in behalf of her husband shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place.

It is held that the proper construction of this phraseology is, that the wife may be *required* to testify in a case where her husband is on trial for a criminal offense only in his behalf, but that she may be called and examined in such a case by the State only where she voluntarily consents to do so. This was held in *The State* v. *McCord* (8 Kans., 232), and the construction is approved in *State* v. *Buffington* (20 Kans., 616).

In the case first cited the defendant was charged with murder. His wife was called as a witness by the State and gave her consent to testify as a witness on the trial.

Defendant objected on the ground of incompetency; the objection was overruled and excepted to.

It was claimed on the part of the defendant that the act intended to establish his innocence by his own testimony, or that of his wife, and that whether husband or wife shall testify for the State is not a personal privilege.

The court held as follows (pp. 239, 240):

> On the trial Sarah McCord, the wife of the appellant, was offered as a witness on the part of the State, and avowed her willingness to testify on the trial. The appellant objected to her as an incompetent witness. The objection was overruled, and the witness

permitted to testify. The propriety of this ruling must be determined by the late statute on this subject. (Laws 1871, p. 280, ch. 118, sec. 1.) This section provides that no person shall be incompetent to testify in a criminal case "by reason of being the husband or wife of the accused," and contains this proviso, "That no person on trial or examination, nor wife or husband of such person, shall be *required* to testify, except as a witness on behalf of the person on trial or examination."

The body of the section makes the husband or wife of the accused a competent witness in all cases. The proviso is a limitation, not on the competency of the witness, but on the power of the court to compel such witness to testify. When by the body of the section the witness was made competent, then if that stood alone all the measures that the law gives to courts could be resorted to to enforce the witness to testify. By the proviso this power is limited; and this is all the proviso attempts to do. Had the legislature intended such a witness competent only when called by the accused they could easily have made it plain by using the word *permitted* or *allowed* instead of the word *required*. This word has a definite meaning. It simply means that the State shall not demand as a right that such a witness under such circumstances shall testify. It does not profess to deal with the *competency* of the witness; only with the right of the prosecution to demand that they should testify, and the power of the court to enforce that demand. Therefore it does not prevent any such testimony from being voluntarily given.

Counsel claim that the word *required* has acquired a technical meaning in the law, and refer us to sections 325 and 326 of the code in support of their view. But in each of these sections the word is used

> in its common and ordinary sense, and the precise one we have given it above. The subpœna demands as a right that the witness shall attend, and of course the court can enforce such a demand by appropriate proceedings. The witness in this case was clearly not within the terms of the proviso, and the court correctly *permitted* the witness to testify. It would have been error had the court *required* her to testify on behalf of the State.
>
> The sanctity and inviolability of the marriage relation is appealed to, and to preserve them the court is urged to give the statute a construction which we have seen it will not bear. The argument is one addressed more properly to the legislature than the court. If the law is open to the objections urged it should be repealed, but this should be done by the legislature, and not by judicial construction.

It is true that the case of *People* v. *Wood* (126 N. Y., 249) may seem to bear somewhat against the construction quoted.

By the New York Code of Criminal Procedure, section 715, husband and wife are made competent witnesses upon the trial of one indicted, but this clause is appended:

> But neither husband nor wife can be compelled to disclose a confidential communication, etc.

The New York court of appeals (p. 271) says:

> We are of the opinion that this section does not leave the matter entirely to the discretion of the witness, but that the other party interested may object to any such communication, and that upon such objection being made the witness not only can not be compelled, but that he or she has no right to make the disclosure.

The statutes are not similar in words or in effect. It may fairly be expected that in construing a State law acted under by the Federal court, the construction settled by the State courts will be accepted. Otherwise the "laws of the State" will be overturned.

And see *Greenleaf on Evidence, 15th edition*, sec. 334 (pp. 472 to 480), for excerpts from statutes of many States upon the general question now under consideration with citations and comments.

The statutes of Kansas and of those of Utah differ so widely upon the subject involved that the case of *Bassett* v. *United States* (137 U. S., 496) is without application.

The two letters, A and B, were proved by defendant, in response to questions by his own counsel, to have been written by himself; the six slips were found at the house which he occupied for a considerable time with the daughter of the murdered woman, and related to his affairs, and the writing of them is practically admitted by him.

The slips were offered in evidence (p. 221), "as a part of cross-examination."

In addition to this, the wife was sworn without objection and was examined under the State law as counsel for both sides agreed that it existed, and upon instructions based upon the State law given by the court upon the request of defendant's counsel, and the testimony—which merely identified the handwriting—was received without an objection made at the time.

These papers are no wise confidential communications, but they are the expressions which the consciousness of

crime and of the danger of immediate pursuit forced from the criminal upon the eve of his flight.

IV.

THE COURT DID NOT ERR IN DECLINING TO ALLOW THE JURY TO GO TO THE PLACE WHERE THE BODY WAS FOUND AND VIEW THE GROUND.

While the plaintiff's evidence was being put in this occurred between defendant's counsel and the court (p. 110):

> Mr. WEBB. I think at some future time we shall ask the court that the jury in charge of a bailiff shall be taken to the Foster house, the Mettman house, and from there to place where teeth, etc., were found, and down gully and creek to where body was found.
>
> COURT. That order shall be made. I will allow that to be done.

No other reference to the subject is found in the record of the trial, except that which appears at the close of the case for the prosecution (p. 176), which is as follows:

> Mr. WEBB. If your honor please, this morning your honor gave us notice that unless we could find some provision of the Federal statute that would authorize the sending of the jury to inspect the grounds, etc., which is the subject of this testimony, that the application would be denied. I have been unable to find any express provision of the statute, but in running through the revision of 1878 it seems to me that the practice in the State courts in actions at common law, whether civil or criminal, except as prohibited by an act of Congress, should control in the Federal courts.

COURT. So far as applicable, yes, sir. The authorities are in conflict upon the question, some holding it can not be had in the absence of the statute, and the others holding it can be done. It certainly is not error to decline to allow the jury to have a view.

Government here rested its case.

The provision of the statute law of Kansas under which it is understood that the application in question was made is as follows (Compiled Laws, 881, p. 768, par. 316):

> (4806) Sec. 316. Whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the officer and a person appointed to show them the place shall speak to them on any subject connected with the trial.

If this provision be held to be applicable to Federal courts it must be admitted that the matter is clearly and unquestionably within the discretion of the court, and no argument is deemed justifiable (see 1, Thompson on Trials, secs. 883, 885).

V.

THE COURT DID NOT ERR IN PERMITTING MARY RAUTZAHN, CO-INDICTEE, TO TESTIFY AS A WITNESS FOR THE GOVERNMENT.

This point arises under the seventh and fourteenth assignments of error, and under the second and fourth subdivisions of the motion for a new trial (p. 233).

The plaintiff in error contends that even when a separate trial is allowed as to one of two or more persons indicted together, the others are excluded from testifying on behalf of the people.

Defendant in error insists that the indictment is, in effect, several as well joint, and that the lawful allowance, (according to statute) of a separate trial, constitutes the indictment, as to the several indictees, a several indictment.

Although section 229 of the Kansas statutes provides that a defendant may be discharged, that he may give his testimony for the State, or for a co-defendant, it evidently does not refer to a case where a separate trial is had, but literally to the cases specified, viz: "When two or more persons are included *in one prosecution.*"

A.

By section 215 of the Kansas statutes (which is quoted in Point III) it is provided that "No person shall be rendered incompetent to testify in criminal causes by reason of his being * * * the person on trial or examination," but he can not be *required* to testify "except as a witness on behalf of the person on trial or examination."

It would seem incongruous to hold that a defendant can be sworn in his own behalf, but that his co-indictee, not then on trial, can not be sworn in his behalf; and likewise, if it were to be decided that the co-indictee not on trial, and who might never be tried, could be compelled to testify in behalf of the defendant, but could not be called by the plaintiff.

The statute of Kansas is in line with those important innovations which have been made in the law of evidence, and which are based upon an increased confidence in human nature and in the capacity of courts and juries to sift testimony and ascertain the truth.

It is respectfully submitted that the lines of the construction of the statutes should run parallel with the progressive lines of legislation, and the liberal purpose shown so markedly in numerous enactments should not be defeated by interpretations based upon views which legislatures have discarded.

In the case of the *State* v. *Barrows* (76 Maine, 401, 410) it is said:

> It is plainly seen that there is much authority and reason for regarding an indictment of two or more persons as in effect a joint and several indictment; joint when the accused are tried jointly, and several when tried separately.
>
> But, as before intimated, we are not to look upon the question before us as exclusively one at common law. Our statutory enactments bear upon it. They have weakened if not abrogated the argument of public policy. It was, no doubt, the design of the legislature that the objection to the competency of parties as witnesses should be removed in both civil and criminal cases. In civil cases the door is opened widely. In criminal cases the provision is this: "In all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. * * * The husband or wife of the accused is a competent witness." (R. S., c. 134, sec. 19.) While this enactment does not cover the present question with literal exactness, it approaches it, affects and influences it, and requires us to examine the matter in

> the light of the legislative policy declared by it. If both defendants were on trial at the same time, either could testify. *Com.* v. *Brown*, (130 Mass., 279). If the argument for the defendant is sound, then the common-law rule has become reversed. Defendants can testify against each other when tried together, and can not so testify when tried apart. We do not assent to such a proposition.

National legislation has shown a purpose to adopt State rules of decision in the respective Federal courts so far as shall be practicable, and has recognized and practically accepted the progressive changes of the period.

The following statutes are of consequence in this connection (R. S.):

> SEC. 721. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.
>
> SEC. 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the com-

petency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

Act of March 16, 1878 (last Supp., 155), is as follows:

> CHAP. 37.—AN ACT to make persons charged with crimes and offenses competent witnesses in the United States and Territorial courts.
>
> *Be it enacted, &c.*, That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.
>
> And his failure to make such request shall not create any presumption against him.

In relation to section 858, Mr. Justice Harlan, in delivering the opinion of the court in *Potter* v. *National Bank* (102 U. S., 164), states the origin of the three clauses of the section, as follows:

> The first clause of this section is, substantially, in the words of the proviso of the third section of the act of July 2, 1864, making appropriations for sundry civil expenses of the Government (13 Stat., 351). The second clause is in the words of the proviso of the act of March 3, 1865, amending the third section of the act of July 2, 1864 (*id.*, 533), while the last clause is founded upon the act of July 16, 1862 (12 *id.*, 588).

And Mr. Justice Blatchford comments upon the same section in *Goodwin* v. *Fox* (129 U. S. 631).

The section must now, of course, be considered as a whole.

A question which naturally arises here is, does the section embrace criminal trials and do the words "witness" and "witnesses" include witnesses in criminal cases?

Do the words "trials at common law" in the last line of the section include criminal trials?

Counsel for defendant in error claims that it is the intent of this section to include criminal trials.

(1) The reason for the rule seems to be as strong in the one case as in the other.

(2) There is no limitation to civil or exclusion of criminal causes.

(3) It would savor of presumption for one to assert that the first clause of the section (viz: "*In the courts* of the United States *no witness* shall be excluded *in any action* on account of color") excludes criminal causes.

The clause manifestly covers all Federal courts and all actions in such courts, and all witnesses in all actions tried in said courts.

(4) That witnesses in criminal cases are within the first

It is conceded that the construction of Sec. 858 is settled by *Logan* v. *United States.* (144 U. S., 263.)

in the last paragraph are the same. They are not of different classes.

It is admitted that Federal courts have no common-law jurisdiction in criminal cases, and that no offense can be punished under United States law which is not made criminal by statute, but when jurisdiction is given by statute, the rules of the common law attach. The procedure is according to common law except where it is controlled by a statute.

The question under consideration is not one of jurisdiction, it is one of procedure.

In the case at bar the penalty for murder is prescribed by section 5339, but murder is not defined and it can not be determined what constitutes the crime without going to the common law, and so of all questions not settled by enactment.

> But the national courts, after jurisdiction is conferred, are to look to the common law, in the absence of statutory provision, for rules to guide them in the exercise of their functions, in criminal as well as civil cases. (Conkling's Treatise, 82.)

And see Story, Const. (secs. 157, 158, and notes).

In *Rice* v. *Railroad Co.* (1 Black, 374) this court said:

> Jurisdiction in common law cases can never be exercised in Federal courts, unless conferred by an act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the Constitution, and the laws of Congress passed in pursuance thereof. Rules of decision also, in cases within the thirty-fourth section of the judiciary act, are derived from the laws of the States; but in the construction of the laws of Congress the rules of

the common law furnish the true guide; and the same remark applies in the construction of the statutes of a State, except in cases where the courts of the State have otherwise determined.

Able counsel submitted the same proposition in the case of *Charles River Bridge* vs. *The Warren Bridge* (11 Pet., 545); but this court refused to adopt it, and, in effect, declared that the rules for the construction of statutes in the Federal courts, both in civil and *criminal cases*, were borrowed from the common law. See also 1 Story, Com. on Con. (3d ed.), sec. 158.

The courts referred to in section 858 are *all courts* of the United States; the actions are *all actions* which are prosecuted in those courts; the word "witnesses" is without limitation as to classes; and the phrase "trials at common law" includes all trials known to the common law—criminal as well as civil, so far as they are not eliminated or superseded by statute.

The discrimination to be observed between a criminal trial (or the trial of one or more persons charged with the commission of an offense) and the procedure to be followed during the trial is not disregarded in this presentation, but it is urged that criminal trials are "trials at common law" as clearly as trials in any civil actions can be.

B.

THE WEIGHT OF AUTHORITY IS IN FAVOR OF THE COMPETENCY OF THE CODEFENDANT, WHO IS NOT ON TRIAL.

(1) It is beyond dispute that some law writers and some decisions have held that an accomplice, occupying the

position of a codefendant in the indictment, can not be called by the State to testify against the principal indictee, even in a case where such accomplice is not on trial. Such is the purport of the opinion in *United States* v. *Reid* (12 Howard, 361).

It will be noted that this decision was made in 1851 while the provisions of enactments which are merged in section 858, Revised Statutes, originated at a later date.

To the same effect is *People* v. *Donnelly*. (2 Park. Crim. R., 182.) This is a general-term decision and was evidently very lightly considered. Clerke, J., says, in effect, that an accomplice jointly indicted, but separately tried, is not competent; but that the same accomplice separately indicted for the same offense might be a witness against his accomplice. Mitchell, J., says: "Our courts have decided," etc., and adds:

> It can not be on the ground of interest, for there is no interest either way; and if it be because he is a party to the record, it applies whether he be called for the people or his codefendants.

A similar doctrine is stated in 1 Bishop's Criminal Procedure, sections 1020 and 1166.

Counsel for the government is confident that in this case he will have no occasion to cite the authorities which tend to support the contention of the plaintiff in error, in order to refresh the memory of the court, as that duty will be fully performed by the opposing counsel.

(2) The authorities which support the competency of Mary Rautzahn in the case at bar are numerous and conclusive.

In *Jones* v. *The State of Georgia* (1846), 1 Kelly, 617) the supreme court of Georgia says as to separate indictments:

> By the fiftieth section of the fourteenth division of the Penal Code it is declared: "When two or more defendants shall be jointly indicted for any offence any one defendant may be tried *separately*, except such offences as require the action and concurrence of two or more to constitute the crime; and, in such cases, the defendants shall be tried jointly." (*Prin. Dig.*, 665.) The defendants elected to be tried *separately* for the offence with which they were charged; and the indictment and trial is to be considered *several* as to each, as much so as if they had been *separately indicted*. Where prisoners indicted together sever in their defence, we are of the opinion it is the right of the prosecuting officer, who asserts the affirmative as to their guilt, to elect who of them he will first put upon his trial. (*The State* vs. *Crank*, 2 *Bail. Rep.*, 66.)
>
> Besides, we are of the opinion, Allen Jones was a competent witness for the prisoner, they having severed in their trial. For the purposes of the trial they are to be considered as if they had been *separately* indicted for the same offence. An accomplice who is separately indicted for the same offence may be called as a witness to prove the innocence of the prisoner. (1 *Chit. Crim. Law*, 605; *Roscoe's Crim. Ev.*, 118; 2 *Russell on Crimes*, 597; 2 *Hale*, 281; 1 *Hale*, 305; *The United States* vs. *Henry*, 4 *Wash. Rep.* 429.)
>
> We the more readily adopt this rule because it will have the effect to abolish a very pernicious prac-

tice which prevails in our courts of including all persons who were present at the commission of an offence, in many cases whether guilty or not, in the indictment, for the purpose of excluding their testimony. Besides, it will open the door for the investigation of truth, leaving the jury to judge of the *credit* to which they may think the witness is entitled.

The rule invoked has also been approved by the supreme court of Ohio. In *Allen* v. *The State* (10 Ohio Stat., 303) it is said:

> It is said to be a settled rule of evidence that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime; and it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime. (1 Greenleaf Ev., 379; *Jones* v. *State of Georgia*, 1 Kelly, 610; *Noland* v. *The State*, 19 Ohio Rep., 131.)

Brown v. *The State* (18 id., 509), is suggestive as to separate trials:

> It seems quite clear to us that a motion by one of two persons jointly indicted, for a change of venue as to him alone, necessarily involves and includes a motion for a separate trial and that the granting of such motion necessarily involves and includes the granting of a separate trial also. There was, then, in fact, an order for a separate trial, as well as an order for a change of venue, both made on motion of the defendant; and it can hardly be seriously denied that, for the purposes of a change of venue under the

> statute, and, indeed, for most purposes, the cases are to be considered after an order for separate trials as separate and distinct indictments. Such was expressly held to be the law in one of the cases referred to (*Allen* v. *The State*, 10 Ohio Stats., 287). There is, therefore, no good ground for either form of this objection. Brown's case had become a separate case by virtue of the order for separate trials, and that "whole case" was removed to Licking County.

Carroll v. *The State* (5 Nebr.) is in point the headnote being:

> WITNESSES. When separate trials are awarded to parties jointly indicted, each is a competent witness for the State upon the trial of the other, without being first acquitted or convicted and without a *nolle prosequi* being first entered upon the indictment.

Noyes v. *State* (12 Vroom R., 429) treats the question as settled in New Jersey and disposes of it thus:

> Again, it is urged that it was error in the court to permit Stedwell, who was jointly indicted with Noyes, to be examined as a witness on the separate trial of the latter.
>
> This question was deliberately considered and decided by this court in the case of *State* v. *Brien* (3 Vroom, 414). The doctrine was incidentally sanctioned in the court of errors in the case of *Hunter* v. *State* (11 Vroom, 495). I can see no reason why the decision referred to should be disturbed.

In the New York courts both sides of the controversy may find their contention supported, but, it is respectfully submitted, the weight of authority supports the competency of the codefendants, not on trial.

In *Wixson* v. *The People* (5 Park. Cr. R., 119) (1860), the question was distinctly presented and the case of *The People* v. *Donnelly* (2 Park. Cr. R., 182) was expressly overruled, and a suggestion of the possible origin of the divergence of decisions is suggested. The court says (p. 126):

> An examination of the cases will show that the correct rule as to the admissibility of accomplices is this: When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the people may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court; but they can not be called as witnesses for each other, though separately tried, while the indictment is pending against them. If acquitted, they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sentence must have followed the conviction. When all are tried together, if the people desire to swear an accomplice, he must in some way be first discharged from the record.

In *Lindsay* v. *People* (63 N. Y., 153), 1875, it is said by the court:

> Accomplices may in all cases, by the permission of the court, be used by the Government as witnesses in bringing their confederates and associates to punishment, and whether more or less guilty does not affect their competency, but the extent of their guilt, and the nature of their offence go to their credit with the jury. The rule contended for by the counsel for the accused would exclude all guilty parties, except accessories before or after the fact, or those who act under some duress, or by the direction or under the influ-

ence of others. An accomplice is one of many equally concerned, or a copartner in the commission of a crime. The term includes all the *particeps criminis*, whether considered in strict legal phraseology as principals or accessories (1 Russ on Crimes, 26). The only case cited by the counsel in support of his position (*Ray* v. *State*, 1 Greene [Iowa], 316) does not sustain him. The court held that a *particeps criminis* was competent against his associate in crime, but, as a matter of precaution he might not be admitted without an order of the court upon an application showing that there was no other person by whom the offence could be proved, and that the witness was not more guilty than the person on trial, and that his testimony could be substantially corroborated. There is no practice in this State requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the State. An accomplice is, in all cases, a competent witness for the prosecution, but whether in all cases he shall be permitted to become a witness, and thus earn an exemption from punishment, which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and the prosecuting officer.

In 1877 the question came before the supreme court of the State again in *Taylor* v. *The People* (12 Hunn, 212), Mr. Justice Talcott, presenting the views of the court, and making some comments upon Lindsay v. The People, and following Wixson v. The People.

In 1884, in *State* v. *Barrows* (76 Maine, 401), Peters, C. J., in presenting the opinion, discusses the question here involved at length, and fully sustains *Wixson* v. *The People*, citing many authorities.

It is said (pp. 408, 410):

> The argument against the admission of such evidence does not strike us with much force. It is almost universally admitted that an accomplice separately indicted may be a witness for the State, and any distinction arising between trials on a joint indictment and trials on separate indictments is not readily appreciated. The crime is supposed to be jointly committed in either case. If there are separate indictments the fact of joint criminality is not withheld from the jury. It is not improper to aver it by way of recital or description. The interest and motives of the witness must be the same whether he is to be afterward tried under the same or another indictment. As said by Beasley, J., in a convincing argument of the question in *State* v. *Brien* (3 Vroom, 414): "The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper with the charge against the culprit whose trial is in progress."
>
> * * * * *
>
> Courts seemed inclined not to regard a codefendant in a criminal case as a party, unless "a party to the issue on trial." That distinction is taken in the English cases before cited. To be incompetent to testify the defendants must be in charge of the same jury. Mr. Starkie struck the same key, who declared that "an indictment against several is several as to each."

A like conclusion is reached in *State* v. *Nash* (10 Iowa, 81).

The writers upon that branch of the law to which the question under consideration properly belongs have, in the main, asserted the correctness of the principle as here contended for on the part of the United States.

The following quotations show the general agreement of the distinguished jurists named:

Wharton's Criminal Evidence, section 439, declares the law to be as follows:

> 439. An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction and although he is a codefendant, provided, in the latter case, his trial is severed from that of the defendant against whom he is offered.

In Abbott's Criminal Briefs (1889, p. 207), the rule is stated as follows:

> 1. *Accomplice as a witness.*—The general principle is that accomplices are now competent for or against each other, unless jointly indicted; and even if jointly indicted they are competent against each other if separately tried. But the courts have a discretion whether to allow one to be used against the other, because this may imply a promise of immunity.

1. Thompson on Trials (1889) says:

> 641. *In the case of persons jointly indicted.*—In the case of persons jointly indicted, if there has been a severance, one defendant may call his late codefendant as his own witness, as a matter of right, and it has been held that he may do so, under such a statute, where there has been no severance. This is an exception to the rule of the common law that persons jointly indicted are not competent witnesses for each other.

Greenleaf on Evidence (edition of 1892, section 379) continues to present the law, as before declared, as follows:

> The admission of accomplices as witnesses for the Government is justified by the necessity of the case,

> it being often impossible to bring the principal offenders to justice without them. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference, as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime.
>
> * * * * *
>
> But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the Government or not, is determined by the judges, in their discretion, as may best serve the purpose of justice.

It is respectfully urged that the acceptance of the testimony of an accomplice indicted with the defendant, but not then on trial, is in accord with the right reasoning of informed and unbiased minds; it is authorized by the principles laid down by elementary law writers of great repute, and it has had the approval of many trial judges and of many other judges sitting in review.

It is urged that the establishment of the rule involved, beyond further controversy, may now be properly asked of this court.

VI.

The eighth assignment of error is not of consequence. The form of this assignment indicates that the chief complaint is that the court saw fit to check an improper examination without waiting for an objection by the district attorney.

During the cross-examination of Mary Rautzahn the following proceedings occurred (p. 153):

Q. Do you know Mr. Doane, who was at that time chief of police?

A. Yes, sir.

Q. Didn't he arrest you or cause you to be arrested once?

A. Yes, sir.

Q. I will ask you if, while you were in jail on one of these arrests, if your father came to the jail and you had a talk with him there.

A. Yes, sir.

Q. On more than one occasion?

A. Yes, sir.

Q. Was there any talk there between you and him about that horse?

A. No, sir.

Q. Now, Mrs. Rautzahn, is it not true that you said in jail, and in talking with your father, and in the presence of James Doane and others, that he, your father, need not be afraid of any blood on the horse, because the blood came from some beef or meat?

COURT. You need not answer that question; I can not see how that can affect the case; it is not cross-examination.

Mr. WEBB. She is giving testimony against this defendant——

COURT. It is not cross-examination in any sense of the word; her trial is yet to follow.

This is all there is of it.

No offer was made; no exception noted or asked for.

A distinct statement of the grounds of this assignment is deemed a sufficient presentation.

VII.

The ninth assignment strongly resembles the eighth and is unworthy of much consideration.

No exception was taken, no offer was made, the proceeding was merely a hunt for something which was not found, and the whole question is disposed of by presenting the questions, answers, and comments of the court, as set forth in the transcript of error (pp. 154, 155), as follows:

> Q. Did you talk with Mr. Doane at all about the number of persons that were frequenting or coming to your father's house prior to your mother's disappearance?
>
> A. Yes, sir.
>
> Q. He was at that time chief of police, was he not?
>
> A. Yes, sir.
>
> Q. Seeking information from you?
>
> A. Yes, sir.
>
> Q. I will ask you if you didn't tell him in one of those conversations that no one was in the habit of coming to your father's house; that you were a widow and living alone with your children and father and mother, and didn't see any one, scarcely?
>
> COURT. You need not answer the question. Fix the time and place of the conversation; otherwise it will be very unfair to ask such a question.
>
> Q. I will have to do that by another question. Your mother was brought home on Friday, the 29th of March?
>
> A. I think it was Friday; yes, sir.
>
> Q. And the funeral took place on the following Sunday?
>
> A. Yes, sir.
>
> Q. Now, with reference to that time; when were you first arrested by Doane?

A. The Saturday evening before Easter Sunday.

Q. Before the funeral?

A. No, sir; the Saturday before Easter.

Q. I will ask you if at that time Mr. Doane was making inquiries in regard to persons who were visiting the house, and in conversation with him you told him that no persons visited the house except neighbors, and in that conversation you told him you were a widow living alone with your parents and didn't see anybody.

A. I don't know, sir, as I told Mr. Doane that; I don't remember it.

Q. Let me ask you as a matter of recollection if you do remember that Mr. Benson's name—this defendant's name—was not mentioned in connection with the homicide or death of your mother for a couple of weeks or more after the body was found?

A. No, sir.

Q. Directly after his name was mentioned did you have a conversation with Mr. Doane?

A. Yes, sir.

Q. I will ask you if in that conversation you didn't tell Mr. Doane that Mr. Benson didn't visit your house oftener than once a year and that you had not seen him since December last.

A. I don't remember telling him.

Q. I will ask you if you told him that at any other time or place.

COURT. That you need not answer. I presume the cross-examination is for the purpose of impeachment, and she is entitled to the time and place.

VIII.

The twelfth assignment relates to testimony offered by defendant's counsel and rejected.

In one of the letters written by Benson to his wife and which came to her by post, is the following sentence (Rec., pp. 123, 175):

> The truth is the mother was in her way for a long time, and also you, Mrs. Benson, because she could enjoy better her hours of love. She is a miserable snake. One should hear Mrs. Rautzahn, then you will know everything. Now, she can better live in incest with her old man, now she is alone with him. No, my dear, sweet girl, you have believed that you could put everything on Benson, but Benson will show it to you, you miserable snake.

Defendant, when upon the stand as a witness, was asked by his counsel to explain why he wrote this in relation to alleged incest. The following is all of this proceeding that appears in the record (p. 206):

> Q. It reads here, and you say that is correct according to your understanding, "One should hear Mrs. Rautzahn" and then "She can live in incest with her old man." I will ask you why you wrote that and whether Mrs. Rautzahn told you about her living in incest with her father.
>
> Mr. ADY. We object; it is incompetent.
>
> COURT. Objection sustained.

1. Defendant's counsel took no exception to the ruling.

2. Benson's guilt or innocence could not be affected by the statement in the letter or by the proposed explanation thereof.

3. Benson's putting the thing in a letter gives him no right to prove it by an alleged admission to himself.

4. Benson had no right to raise collateral issues by attempting to sustain his attacks upon his former paramour.

IX.

The sixteenth assignment of error relates to the verdict of the jury.

The verdict was received without objection and was filed June 16, 1891. (P. 233.)

A motion for a new trial was filed on the 13th and a motion in arrest of judgment on the 18th.

The verdict is as follows (p. 233):

> In the circuit court of the United States for the district of Kansas.
>
> THE UNITED STATES *vs.* C. A. BENSON AND MARY Rautzahn. } Indictment for murder.
>
> We, the jury in the above-entitled cause, duly empaneled and sworn upon our oaths, find the defendant, C. A. Benson, guilty of murder as charged in the first count of the indictment, and not guilty upon the second and third counts as charged in the indictment.
>
> B. F. MILLER, *Foreman.*

The last point specified in the "motion in arrest" reads:

> The verdict of not guilty as to the second and third counts of the indictment operates as (and in judgment of law is) an acquittal upon the first count of said indictment also. (P. 234.)

This assignment implies that the finding of not guilty upon the second and third counts is an acquittal upon the whole indictment.

It will be noticed that the body of the verdict consists of two subdivisions, or a first and a second part. The first subdivision relates to the first count of the indictment; the second subdivision relates to the second and third counts.

It is fair to infer that the question relating to the first count, and determined in the first subdivision of the verdict, was first passed upon by the jury.

Hence the objection contained in the assignment of error assumes that it was error for the jury to find the defendant not guilty on the last counts, after having found him guilty on the first count.

In case the condition of the remains of the murdered person were such as to leave a doubt whether death occurred from a wound in the head or one in the heart, it would clearly be the duty of the district attorney to charge according to each theory, in several counts; but it would be a strange conclusion to hold that because the jury find the defendant not guilty of murder by wounding the heart, they also acquit him of guilt in wounding in the head.

The third count charges that death occurred from an assault made with a "sand bag, club, or other blunt instrument." (Fol. 7.)

It can hardly be said that acquitting the defendant of having accomplished the death with such means is an acquittal as to shooting "in and upon the head."

The second count charges that the death occurred from a bullet shot out of a revolving pistol, "in and upon the left side of the *neck* of her the said Teresa Mettman.

If defendant did not, in fact, send the bullet against the *neck*, he was entitled to acquittal as to this count.

Such an acquittal would not declare that the bullet was not shot "in and upon the *head* of the deceased."

The *first* count charges that the death occurred from a bullet shot out of a revolving pistol, "in and upon the *head* of the said Teresa Mettman."

The conclusion and findings of the jury, after hearing the testimony which was placed before them on the trial, was, that deceased was killed by a bullet which struck about two inches posterior to her left ear, and that this point of contact was upon the head and not upon the neck of the deceased.

The testimony of the physicians fully authorizes and supports the verdict.

Dr. Thomas, a physician and surgeon, was present at the post-mortem examination, and was examined upon the trial. (76–81.)

It was shown that there was a bullet wound and also a wound made by some blunt instrument, the latter causing a fracture clear across the back of the head from left to right; while the bullet wound was outside of this fracture, or "crush," and was "in the back of the head, two inches back from the left eye."

Dr. Thomas says (pp. 77, 78):

> Q. Did you discover any wounds on the head of that person?
>
> A. Yes, sir; in front there was a contusion over the right eye and a clot of blood surrounding the right corner of the eye; that was all the appearances we noticed at the front until the scalp was removed; that is, as to the head.

Q. And then what did you find?

A. We found that the back, after the scalp was removed and the top of the skull removed, we found that it was fractured behind; a large fracture running across the back of the head, and there was a clot, a large clot of blood under the scalp at that point, and there were several fractures running from this large fracture on the back of the head, making two or three pieces or fragments; and then there was found a bullet hole on the left side about two inches back of the eye.

Q. A bullet hole?

A. Yes, sir.

Q. In the back of the head?

A. Yes, sir; in the back of the head, two inches back of the left eye.

Q. How? About so?

A. That is rather more than two inches from the left eye; it was measured two inches from the left eye back.

Q. That was a bullet hole?

A. Yes, sir.

Q. Did you see the point of exit of that bullet? What was your judgment as to whether that was the point of entrance of the bullet?

A. Of the bullet?

COURT. Whether that was the point of entrance?

A. All the edges were drawn in, and from all appearances it was the entrance of the bullet.

Q. Did you find the point of the exit of the bullet?

A. No, sir.

Q. Did I understand you that the scalp was considerably crushed on the left side of the back of the head?

A. It was. The back part of the head was fractured clear across from left to right.

Q. In your judgment what kind of an instrument could have inflicted that wound?

A. The wound on the back of the head?

Q. Yes, sir.

A. It was some very heavy instrument; some obtuse instrument.

Q. Was this bullet hole within this crushed place?

A. No, sir; it was over in front.

Q. You may state to the jury whether or not, in your judgment, the crush was sufficient to produce death.

A. It was.

Q. You may state whether or not, in your judgment, the gunshot wound or *the* wound you say was made by a bullet was sufficient to produce death.

A. It was.

Q. State to the jury whether or not the gunshot wound was necessarily mortal.

A. It was.

Upon the cross-examination he testified as follows (pp. 80, 81):

Q. Now, doctor, you stated that that crush—was the language of counsel for the Government—inflicted upon the back of the head was sufficient to produce instant death?

A. Yes, sir. I said it was a mortal wound; that death would result.

Q. I did not mean to say instant death. That it was sufficent to produce death. That was the language. Now, I will ask you if, in order to produce that injury upon the back of the head, the blow would have been sufficient to knock a person down if standing?

A. Yes, sir.

Q. You say that the jaw was broken?

A. The jaw was broken ; yes. sir.

Q. And the injury was to the right eye?

A. Yes, sir.

Q. Now, a person struck in the back of the head with something sufficient to produce death, and given with momentum to make a body fall instantly, would not such falling body upon a hard floor, or hard cellar, or hard ground, or pavement, produce the fracture of the head and the injury over the eye?

A. The injury over the eye could have been produced that way. It would have had to fall upon a hard rock to have produced the clot of blood, and the fracture was at the back of the eye.

Q. Suppose the blow was inflicted from the front with some instrument which created that injury or wound there, and at the same time the knock caused the person to fall backward, and then it should strike upon something, would not both wounds be inflicted in the same way ?

Q. It is simply a question whether a person struck from the rear or in the face and knocked down, would not the one blow cause—the body being struck, if struck from the back—produce the injuries over the eye and to the head, and if struck in the face should strike heavily upon some rock or stone cause the injury to the back of the head ?

A. I don't think they occurred from the same blow.

Q. Why not ?

A. Because the direct stroke and the counterstroke would not be so great in both places.

Q. Now, doctor, I want to know if that injury received in the back of the head was sufficient to produce death, and caused the body when it received it, being in an upright position, to fall down, whether or not there would be any life to be extinguished by a shot afterwards ?

A. With such a fracture as I found I have known persons to live a day or two outside of the fracture made by the bullet.

Q. Well, that injury that you first described as being in the neck?

A. While being sufficient to produce death it would not produce instant death.

Q. In regard to the gunshot wound, would not that have produced instant death?

A. Yes, sir; the gunshot wound was sufficient to produce instant death.

Q. Then you would argue from these facts that it is probable, and as a matter reasonable to be inferred, that the injury, if from some blow, was inflicted afterwards?

A. That would be a conclusion; yes, sir.

It will be noted that defendant's counsel speaks of the elongated fracture as "*being in the neck.*"

Dr. Goddard, a graduate of Bellevue Hospital (p. 82), on page 84, describes the fracture across the back of the head, and then testifies as follows:

Q. Did you find a gunshot wound?

A. Yes, sir; two inches back of the left eye, extending backward, inward, and towards the right side; upwards I should say.

Q. In your opinion, what was the gunshot wound inflicted with?

A. From other wounds I have seen I judge it to be a .44 or .45 caliber pistol ball.

Q. And the other wounds, the crushing of the skull?

A. In my opinion it was done with an instrument something like a big shot or a sandbag; something with a soft surface.